CASES

ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF LOUISIANA.

EASTERN DISTRICT, MAY TERM, 1829.

Eastern Dist. *May*, 1829.

DEPAU vs. HUMPHREYS

DEPAU vs. *HUMPHREYS.*

APPEAL from the court of probates of the parish and city of New-Orleans.

The rate of interest to be paid from the date of a note may be legally stipulated, according to the law of the place where the note is made, altho' it be payable in another, where the stipulation of a lesser rate is alone legal.

MARTIN, J. delivered the opinion of the court. The defendant, administrator of the estate of W. Kenner, deceased, sued on sundry notes of the firm of W. Kenner & Co. (composed of the deceased, Clague and Oldham) given in the city of New-York to the plaintiff, pleaded the statute of usury of the state of New York. On this, the plaintiff, with the defendant's consent, filed a supplemental petition, in which he prayed that, if the plea of usury was sustained, he might have judgment for the balance due him

Eastern Dist. May, 1829.

DEPAU vs. HUMPHREYS

by the firm, before the notes mentioned in the original petition were given. To this supplemental petition the plea of usury was repeated. The defendant had judgment, and the plaintiff appealed.

In this court, the appellant's pretensions have been confined to the amount claimed in the supplemental petition, and his counsel has relied on the cases of *Gray* vs. *Taylor*, 1 *Hen. Blackstone*, 462, and *Gaylher* vs. *the Bank of Georgetown*, 1 *Peters* 43, to shew that, admitting the notes in the original petition are avoided by the statute, they present no obstacle to his recovery of the preceding debt. The appellee's counsel has not urged any authority or reason to destroy or weaken the weight of these cases.

To establish the amount due by the firm to the appellant, at the time their notes were given, his counsel has produced an account current subscribed by the firm, in the city of New-York; by which they recognise themselves debtors of a balance of $14,154 93 on the 31st of July, 1823, and afterwards debit themselves for $15,000, the amount of a note of Clague & Oldham, endorsed by the firm, gi-

ven in New-Orleans, payable in New-York, bearing interest at ten per cent. from the date, that rate being the highest one of conventional interest, according to the law of Louisiana; the note being given in New-Orleans. The firm debit themselves further for the sum of $500, for four months' interest then due on the note. These three items form the sum of $29,654 98. The firm is next credited for a sum of $1313 34, and a balance is strnck as due from them of $28,349 59, to which $459 71 were added as due for interest, and the final balance is stated at $28,801 30 due on the first of August, 1823.

On this the appellee shews that, on the ninth of the same month, the appellant received, in New-York, five notes of the firm for the aggregate sum of $29,654 98, payable at one, two, three, four and five years; and it being the intention of the parties that he should receive interest at the rate of ten per cent. according to the law of Louisiana, but in violation of that of New-York, which does not allow a higher rate than seven per cent., the notes were made payable at the latter rate, and a sixth was given, payable in three years,

Eastern Dist. *May*, 1829.

DEPAU *vs.* HUMPHREYS

for the difference of three per cent. between the two rates. The counsel, afterwards producing the statute of usury of the state of New-York, which avoids all contracts, in which a higher rate of interest than seven per cent. is stipulated, has concluded that these six notes were tainted with usury, according to the laws of the place, in which they were made.

The opposite counsel has not, in this court, made any attempt to controvert this proposition.

The appellee's counsel has not contested the appellant's right to the original balance of $14594 93, stated to be due on the 31st of July, 1823, but has insisted on a credit of $11,851 93, the amount of two of the notes mentioned in the original petition, which were paid at maturity, reducing the balance due the appellants to $2292 66.

As to Clague & Oldham's note for $15000, it has been urged that the firm was bound as endorsers only; that the diligences, from which their liability would have resulted, were neglected; that it has been cancelled: that no obligation resulted from their debiting themselves with the amount of the note, and interest due

thereon on the first of August, 1823, on the account then stated, in the city of New-York, because that settlement was made to carry into effect a corrupt bargain, imposed on them by the appellant, and to which their necessities compelled them to submit, in order to obtain some delay: that the note is in itself usurious, inasmuch as it states on its face a rate of interest proscribed in the state in which payment was to be made.

We think the settlement, in which the balance due by the firm to the appellant was stated on the first of August, 1823, has not been proven to be tainted with usury (unless Clague & Oldham's note was so). Nothing shews that the contract for further time, according to which the notes stated in the original petition were given, eight days after, was in contemplation. At the time of this settlement, the note was not yet payable; it cannot be imputed to the appellant that he neglected the diligences which charge an endorser.—The firm might very fairly with their consent be charged with the amount of a note of two of its members, endorsed by the firm, and on their assuming to pay its amount as principals,

Eastern Dist. May, 1829.

DEPAU vs. HUMPHREYS

and crediting the appellant with capital and interest, the surrender of the paper would not affect the liability of the firm.

So that the decision of this case must turn on the legality of the rate of interest stipulated for, on the face of the note of Clague & Oldham.

The appellant's counsel urges that the rate of interest may be stipulated, according to the law of the place in which the money is lent, and a note taken for its reimbursement, altho' such a note be payable elsewhere.

In support of this position, he has invoked many authorities, and principally the case of *Van Reimsdich* vs. *Kane & al.* 1 *Gallison* 375. In which, Judge Story, delivering the opinion of the court, said: "This rule is well settled, that the law of the place where a contract is made is to govern, *as to the nature, validity* and *construction* of such contract; and that, being valid in such a place, it is to be considered equally valid and to be enforced every where, with the exception of cases, in which the contract is immoral or unjust, or in which the enforcing of it in a state would be injurious to the rights and the interests, or

the convenience of such state or its citizens. This doctrine is explicitly averred in *Huberus de conflictu legum*, and has become incorporated into the code of national law in all civilized countries. It would seem to follow from this doctrine, that, if a contract be void, by the law of the place where it is made, it is void every where, and that the discharge of a contract in the place where it is made shall be of equal avail in every other place. *To this last proposition*, there is an exception, when the contract is to be executed in a place different from that in which it is made, for the law of the place of execution will then apply."

The counsel contends that, as to the first proposition, the applicability of the law of the place where the contract is made to the nature, validity and construction of the contract, the judge speaks absolutely, and states no exception—and the exception he afterwards states is confined to the case of the *discharge* of the party, which is to be tested by the law of the country in which the performance was to take place.

1. The appellee's counsel has first drawn our attention to the passage of *Huberus*, refer-

Eastern Dist. May, 1829.

DEPAU vs. HUMPHREYS

red to by Judge Story, a translation of which is to be found in 3 *Dallas*, 361.

Huberus, after stating that a contract, valid according to the law of the place where it is made is valid every where else, adds: *Verum tamen, non ita* precise *respiciendus est locus in quo contractus est initus, ut si partes alium in contrahendo, locum respexerint, ille non* potius considerandus *nam contraxisse unusquisque, in eo loco intelligitur, in quo ut solveret, se obligavit. ff.* 44, 7, 21.

Hence, the counsel thinks that by comparing the opinion of Judge Story with the part of *Huberus*, on which it is grounded, it follows that, as the note under consideration, was made payable in New-York, its validity and construction must be governed by the laws of that place.

2. He relies next on another law of the digest, 42, 4, 3. *Aut ubi quisque contraxerit: Contractum autem non utique in eo loco intelligitur quo negotium gestum sit, sed quo solvenda est pecunia.*

Pothier's contrat de change is next introduced, in which it is said that the protest of a bill of exchange is to be made according to

the law of the place in which the bill is payable. *Merlin, Questions de droit, verbo Protest*, are quoted to shew the same principle, and that all the obligations, resulting from a bill of exchange, are governed by the law of the place at which it is payable.

4. The counsel then resumes the *corpus juris civilis*, to shew that, a question arising as to the price of wine, which the defendant had failed to deliver, it was decided that if there was a place of delivery stated, the price there was to be given, otherwise that of the place in which the suit was brought. *Interrogavi, cujus loci pretium sequi opporteat, respondit, si convenisset in certo loco redderetur, quanti eo loco esset; si dictum non esset, quanti ubi esset petitum. ff.* 9, 1, 3. § 4

5. The following note of *Gregorio Lopez on Partida*, 3, 2, 32, is produced: *Quando contractus celebratur in uno loco, puta in Hispali et destinatur solutio in Cordubæ; tunc non inspicitur locus contractus, sed locus destinatæ solutionis, ut habetur in ista lege et l. contraxisse.*

6. *Voet's* authority, which is next brought under consideration, appears better to support

Eastern Dist. May, 1829.

DEPAU vs. HUMPHREYS

the position of the appellee's counsel than any other. *Si alio in loco, graviarum usurarum stipulatio permissa, in alio vetita sit, lex loci in quo contractus, celebratur spectanda videtur, an moderatæ, an vero modum excedentes usuræ per conventionem constitutæ sint. Dummodo meminerimus illum propie locum contractus, in jure non intelligi, in quo negotium gestum est, sed in quo pecuniam ut solveret se quis obligavit. Ad Pandect. 22 de usuris et fructibus.*

7. The British and American cases, cited by the appellee's counsel are *Robinson* vs. *Bland*, 2 *Burrows* 1077, 17 *Johnson* 519, 20 *id.* 102, 2 *Johnson's cases* 355, *Whiston & al.* vs. *Stodder & al.* 8 *Martin* 952, *Vidal* vs *Johnson*, 11 *id.* 23.

The proposition, which the appellee's counsel has laboured to establish, is that a contract (as to its nature, validity, effect and the manner in which it is to be performed, or the obligations of it are to be dissolved) is *exclusively* to be governed by the law of the country, in which the performance was to take place: i. e. that there is but one *locus contractus.*

The appellant's counsel urges that there are two *loci contractus;* that in which the contract took place, and that in which the performance was intended. *Locus ubi contractus celebratus est*; *locus destinatæ solutionis.*

Keeping this distinction in view, let us examine the authorities, by which the first proposition is attempted to be supported.

1. *Huberus* says, we are not so *precisely* to consider the place, in which the contract was begun; that if the parties had in contracting another place in view, the latter should not more virtually *potius* to be attended to. In the translation in Dallas' reports, *precise* is translated by *exclusively.* Hence the impression that our minds have received is, that the law of the place, in which the contract is entered into, may have some influence on it, even when the performance of it was to take place in another country.

This leads us to the examination of the laws *contraxisse* and *aut ubi quisque.* They are etxremely short.

The first says: *Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se*

Eastern Dist. May, 1829.

DEPAU vs. HUMPHREYS

obligavit. Every one is understood (presumed) to have contracted, in that place where he bound himself to pay.

Godefroy, the annotator of the *corpus juris civilis*, appears to have considered this law as a mere rule of evidence; for he gives us the reason of it in the margin. *Quia ubi non apparet quod actum est, loci consuetudo attenditur.* He seems to think that, when the parties clearly express their meaning, the law is inoperative—that when the lender stipulates for a legal rate of conventional interest, and the borrower agrees to pay it, there is no necessity, in endeavoring to discover their intention, by examining what is customary at the place in which the contract is to be performed. This conclusion is strengthened by the reference he makes to another law of the digest. *Si numerus nummorum, legatus sit, neque appareat quales legati sint, ante omnia ipsius patrisfamilias consuetudo, deinde regionis in qua versatur, inquirenda est. ff* 30, 1, 50. From this last law *Godefroy* refers his readers to the laws *Interrogavi* and *item non apportet* which the appellee's counsel has cited.

II. The second law relied on; *Aut ubi quisque*, which is the third of the fifth title of forty-second book of the digest, cannot be understood, without considering the two preceding.

The first says: *Venire bona ibi oportet ubi quisque defendi debet, id est.* One is bound to suffer the sale of his goods, under an execution, at the place in which he is bound to defend himself, that is to say:

Law 2. *Ubi domicilium habet*; where he has his domicil.

Law 3. *Aut ubique quis contraxerit. Contractum autem non utique eo loco intelligitur, quo negotium gestum sit, sed quo solvenda est pecunia.* Or where he contracted. For, the contract is not understood to be where the business is done, but where the money is to be paid.

All that this law teaches us is, that at Rome the defendant was suable at his domicil, and at the place where he bound himself to pay.

III. *Pothier & Merlin* have often shed on matters, discussed in this court, a light which we would have sought in vain in British and American writers. But, in the present case, a

Eastern Dist. *May*, 1829.

DEPAU vs. HUMPHREYS

resort to the parts of their works, to which the appellee's counsel has drawn our attention, would rather embarass, than aid our enquiry. As protests are generally made at the place in whic the bill of exchange is payable, and instruments must be in the forms prescribed by law, of the place in which they are made, it follows that the protest must generally be made according to the law of the place in which the bill is payable. But, a bill may be drawn on London, payable in Paris or Amsterdam—the protest for non-acceptance must then be made in London, and the form of it be according to the law of England—the protest for non-payment must be made in Paris, and consequently be regulated by the law of France. We must dismiss those French authorities, with the observation, that, in these states, the principle, that all the obligations resulting from a bill of exchange, are governed by the laws of the place, at which it is payable, is inadmissible. The validity, and to some purpose, the construction of the contract of the drawer, and of each endorser, must be governed by the law of the place of drawing, and indorsing; but, as each of these in effect undertakes that

ne drawee shall accept and pay the bill, according to its tenor in ascertaining the obligations of the drawer and several indorsers recourse is necessarily had to the law of the place in which the bill is payable, to discover whether the holder has exercised due diligence, and what will be a fulfilment on the part of the drawee of the undertaking of the drawer and indorser, in respect to the acts to be done by him: if it appears that the undertakings of the drawer and endorser have not been fulfilled by the drawee, a resort must he had to the laws of the places of drawing and indorsing to determine what notice the holder must give, of the dishonor of the bill, and the amount of the damages to be paid by the drawer and several indorsers. In the case of a bill drawn in New-Orleans on Philadelphia, the Supreme Court of New-York, in *Hicks* vs. *Brown*, 12 *Johnson*, 143, said "the drawer became conditionally liable for the payment, and the condition was his receiving due notice of the dishonor of the bill, and this notice was to be given in New-Orleans; the circumstance of the bill being drawn upon a person in another state, makes no difference."

Eastern Dist. *May*, 1829.

DEPAU *vs.* HUMPHREYS

Alike decision took place in Pennsylvania, in the case of a bill drawn in South Carolina *Hazzlehurst* vs. *Kean*, 4 *Yates* 19.

In *Slocum* vs. *Pomroy* the Supreme Court of the United States, held that the endorser was liable to damages, according to the law of Virginia, having endorsed the bill in Alexandria. Chief Justice Marshall, who delivered the opinion of the court, said: "although the drawer was not liable to the damages of Virginia, the endorser is. An endorsement is not simply the transfer of the paper; but a new and substantial contract." 6 *Cranch* 221.

These decisions support the proposition of the appellee's counsel much more strongly than the principle he invokes from Merlin; because they shew that the drawer and endorsers are bound according to the law of the place where they bound themselves respectively to pay—their undertaking is not to pay at the place where the bill is payable, but at the place in which they contract, provided due diligence be exercised on the dishonor of the bill: and a decision, that they are bound according to the law of the place in which the bill is payable, would violate the principle

invoked, by the law *contraxisse*, under which the party is bound according to the law of the place, *ubi ut solveret se obligavit.*

IV. The laws *interrogavi* and *item non opportet*, have been stated at full length and require no observation.

V. The Partida, 3, 2, 32, to which Gregorio Lopez has annexed the note cited by the appellee's counsel, treats of the jurisdiction of courts, *ante quien deve el demandador hacer su demanda para responder el demandado*; and Gregorio concludes that the judge of the place, in which the defendant bound himself to pay, has jurisdiction, and not the one of the place in which the contract was made.

VI. The passage, cited from Voet, will be examined at the close of the opinion.

We are now to attend to the British and American authorities. The first is the case of Robinson vs. Bland, 2 *Burrows*, 1077.

This was an action on a bill of exchange, drawn in France on London, for money lost at a gaming table—there were other counts. Lord Mansfield premised his opinion, by the observation that the facts scarce left room for any question; the laws of France and Eng-

Eastern Dist. *May*, 1829.

DEPAU *vs.* HUMPHREYS

land being the same. He then stated that there were three reasons, why the plaintiff should not recover, on the bill.

The first was that the parties had a view to the law of England. The law of the place can never be the rule, where the transaction is entered, with an express view to the laws of another country, as to the rule by which it is governed. He referred to *Huberus and Voet*. In every disposition in contracts, where the subject matter relates locally to England, the law of England must govern and be intended to govern.

Mr. Justice Denison thought that, as the plaintiff had appealed to the laws of England, his case was to be determined by them.

Mr. Justice Wilmot said the case came out to be no case at all; no point at all; no law at all.

Finally, the plaintiff recovered on a money count.

As the court was not called upon to determine, whether a contract valid at the place in which it was entered into, but otherwise at the place of payment, was void; we think that what fell from Lord Mansfield must be con-

sidered as an *obiter dictum*, on a question he was not called upon to solve.

It is true, this dictum fully supports the appellee's counsel's proposition, and comes from one of the most able judges that ever sat in a British court, and as such is entitled to much respect, but to no greater weight, than it will have, after a consideration of the authorities on which it rests.

The case in 17 *Johnson*, 519, is a statement of the opinion of the court of Chancery of England, which decided that a bond executed in England and made payable in Ireland, carried Irish interest *where none was stipulated. Pre. Ch.* 128.

This case appears to support *Huberus*' opinion, that the *lex loci solutionis* is to be referred to, when the parties have not expressed their intentions. *Cum non apparet quid actum est*, and the distinction, that will be taken by-and-by, places the interest *ex mora* under the control of the law *contraxisse*.

In the case of *Van Schaick* vs. *Edwards*, 2 *Johnson's* cases 255, a resident of Massachusetts, owning lands in New-York, entered into a contract, in the former state, with an inhabi-

Eastern Dist. May, 1829.

DEPAU vs. HUMPHREYS

tant of the latter, for the sale of the lands on a credit, and took a bond, with a rate of interest exceeding that of Massachusetts, but less than that of New-York, and gave his own bond for a conveyance, on receipt of the money; the suit was on the vendor's bond, and on the question whether the bond was usurious, and whether the laws of Massachusetts were to govern, the court was divided. So, the case throws no light upon the question under consideration.

Two decisions of this court have lastly been invoked: that in *Whiston & al.* vs. *Stodder & al. syndics*, 8 *Martin* 95, and that in *Vidal* vs. *Thompson*, 11 *Id.* 23.

In the first, we held that on a sale completed in England, where the vendor has no privilege on the thing sold, he acquires none on its being brought here; and we cited *Cassaregis disc.* 179, where it is holden, that contracts are made in the country, and subject to its laws, where the final assent may have been given, viz: that of a merchant who receives and executes the order of his correspondent.

In the case of *Vidal* vs. *Thompson* and that of *Morris* vs *Eves*, 11 *Martin*, we recognized

principles which, if correct, must determine this case in favor of the appellant, viz:

1. An instrument, as to its form and the formalities, attending its execution, must be subject to the laws of the place were it is made, but

2. The law and usages of the place where the obligation, of which it is evidence, is to be fulfilled, must regulate the performance.

3. In *Morris* vs. *Eves*, we held that a contract, made in a foreign country, is governed by its laws, in every thing which relates to the mode of construing it, the meaning to be attached to the expressions by which the parties may have engaged themselves and the nature and validity of the engagement.

If these principles be correct, there must be two *loci contractus*, to be considered in law, in a contract which is to be performed in a different place than that in which it is entered into; *locus celebrati contractus—locus solutionis;* in many an instrument more than two places as *loci contractus* are to be considered. The holder of a protested bill of exchange has his remedy against the acceptor, according to the laws of the place on which the bill

Eastern Dist. *May*, 1829.

DEPAU vs. HUMPHREYS

is drawn; against the drawer according to the law of the place in which the bill was drawn; and when there are several endorsers, he may have his remedy against each of them, according to the law of the place where he endorsed. Reason points out that, in every act, the place in which it is to take place, is to be considered in ascertaining its validity and effect.

Locus contractus dicitur duobus modis: primo ubi contractus, seu conventio vel obligatio perficitur; secundo, ubi solutio vel deliberatio destinatur. Pres. Everard, cons. 78.

The distinction, as to the parts of a contract which are to be governed by the law of the place in which it was entered into, and those which are to be governed by the laws of the place in which the payment was intended, is well marked.

In the first class, is first included whatever relates to the form and perfection of the contract, and all the ceremonies and formalities attending it.

In scriptura instrumenti, in ceremoniis et solemnitatibus, et generaliter in omnibus quæ ad formam et perfectionem con-

tractus pertinent, spectanda est consuetudo regionis ubi fit negotium. Debet enim servari statutum loci contractus, quoad haec quæ oriuntur secundum naturam ipsius contractus. Alex. cons. 37. It is incontrovertible that in this passage *Alexander* speaks of the *locus contractus*, as the place *ubi fit negotium.*

Generaliter, in omnibus quæ ad formam contractus, ejusque perfectionem pertinent, spectanda est consuetudo regionis ubi fit negotiatio; quia consuetudo influit in contractus et videtur ad eos respicere et voluntatem suam eis commodare. Christinæus. Modo sic est. Quoad perfectionem contractus seu solemnitatem adesse, seu substantiam ejus requisitam, semper inspicitur statutum seu consuetudo loci celebrati contractus. Pres. Everard, cons. 78. As this writer says that the law *loci celebrati contractus* is always attended to, we must understand him as repelling the idea, that there is any exception, as to cases in which the payment is to be made at a different place, than that in which the contract is entered into. The *locus celebrati contractus* is here clearly put into contra-distinction with the *locus solutionis.*

Eastern Dist
May, 1829.

DEPAU
vs.
HUMPHREYS

In the same class, are next to be placed all matters resulting from the *nature* of the contract, or immediately therefrom.

Inspicimus locum contractus, in his quæ veniunt ex natura contractus. Bartolus ad l. 1 *ff. de usuris.*

In concernentibus contractum et emergentibus tempore contractus, says *Dumoulin*, *spectatur locus in quo contrahitur.*

Si lis oritur ex natura et tempore contractus, consideratur statutum loci. Srick. de jure in alieno territorio exercente.

Aut quæris de his quæ oriuntur secundum formam ipsius contractus—aut de his quæ oriuntur expost facto, proper negligentiam vel moram; primo casu inspicitur locus contractus et intelligo locus contractus, ubi celebratur, non ubi collata est solutio. Bartolus, ad l. cunctos populos, Code de sum. Tr. no. 15 *&* 16. Here Bartolus emphatically calls the *locus celebrati contractus*, the *locus contractus* in contra-distinction of the *locus destinatæ solutionis.*

As to what concerns the performance of the obligation—the payment of the sum, or the delivery of the thing, which is the object of

the contract, the presentation for acceptance and payment of a bill of exchange; the acceptance, days of grace, protest, weight, measures, damages arising from negligence or delay—the *locus destinatæ solutionis* is to be considered.

Sed ubi agitur de consueludine solvendi, vel de his quæ veniunt implendi, diu ex post contractum et in alieno loco impletione destinato, tunc inspicitur locus destinatæ solutionis, Everard, cons. 78. It is in this particular that the law *contraxisse* is particularly and exclusively applicable; because to use its expressions, every one is understood to have contracted in that place, (viz: with a view to that place,) in which he bound himself to pay. *Contraxisse unus quisque in eo loco, intelligitur, ubi ut solveret se obligavit;* there, according to the second law invoked by the appellee's counsel, he is suable, because it is the place *ubi contraxisse*, and as to him *contractum autem non utique eo loco intelligitur quo negotium gestum sit, sed quo solvenda est pecunia.* But as to the party, with whom he who binds himself to pay money, as to the obligation of the vendor, who has stip-

Eastern Dist. May, 1829.

DEPAU vs. HUMPHREYS

ulated for payment in a place different from that in which the sale takes place and the thing is to be delivered, the contract as to the period at which the property of the thing sold, passes to the vendee; the mode of delivery, the obligations of warranty, the manner of his being put *in mora*, the liability to the redhibitory action, or that *quanti minoris*, the law of the place, in which the vendee bound himself to pay, affords no legitimate rule of decision; for the vendor did not bind himself to perform any act there, that is not the place *ubi ut solveret se obligavit.* As to him, that place is the one in which he bound himself to deliver the thing sold and to warrant it: and we are to resort to the law of this last place, to ascertain whether his, the vendor's, obligations were duly performed, and to assess the damages due to the vendee, if they were not; because, as to the vendor, that place is, in the language of Everard, *locus ubi deliberatio destinatur.*

Certainly, in a bilateral a synallagmatic contract, where the obligations of the parties are to be performed in different places, in which different laws and usages prevail, the laws and usages of neither can offer a legiti-

mate rule of decision, for all the obligations of the contract. Each party must perform his according to the law of the place, *ubi ut solveret se obligavit*—and in case he fail, he must yield to his adversary, damages equal in value to that of the thing he bound himself to deliver, at the place *ubi solutio* or *deliberatio destinatur.*

In obligations to pay money, the measure of damages is interest, according to the legal rate. The Roman law considers interest, rather as damages to be allowed for the delay of payment, than as a profit contemplated at the time of the contract. *Usuræ non propter lucrum petentium; sed propter moram solventium, infliguntur ff.* 22, 1, 17 & 3. As such they are regulated by the law of the *locus destinatæ solutionis.*

But, in a loan of money, nothing is more common, in countries where the parties are not restrained by law to one rate of interest, to stipulate a particular one, (by their convention,) within the scope which the law allows, and this interest is called conventional by contradistinction from the legal interest *ex mora.*

In such a case, as the object of the conven-

Eastern Dist. May, 1829.

DEPAU vs. HUMPHREYS

tional interest is to afford to the lender a compensation for the profit he foregoes, in yielding the use of his money to the borrower, it should seem, that the circumstance, of the place of payment differing from that in which the lender parts with his money, ought to have no influence, in the fixation of the rate of interest.

Accordingly we find it laid down that *usurarum modus constituendus est, in regione in qua contrahitur; et cum, redditus duodenarius, in Gallia stipulatus, in controversia incidisset, patrocinante me justicatum est in curia Flandriæ, valere pactum, nec obesse quod in Flandria, ubi redditus constitutus licet hypotecæ impositus proponeretur, usuras semisse graviores stipulari non liceat. Sed hoc intellige de usuris in stipulationem deductis, sed non de iis quæ ex mora debentur; in quibus ad locum solutionis respicere oportet. Burgundus, Tract. n. 4, and also n. 27, 28 & 29.*

Quand il s'agit de decider, si des conventions faites du sujet des droits qui naissent ex natura et tempore contractus, *sont legitimes ou non, il faut suivre la loi du lieu ou se passe le contrat. Boullinois, Ob. 46.*

Si s'agit de determiner la legitimite du taux des rentes, et que dans le lieu de la passation du contrat, le taux soit different de celui qui se paye dans le lieu du domicile du debiteur, ou dans celui du creancier; soit encore dans les lieux ou les biens hypotheques sont situes; le taux sera jugé tres légitime, s'il est conforme a la loi du lieu ou le contrat se passe. Id.

Let it be noticed, that although Boullinois states a case, in which no place is stipulated, for nominatim, he states it, in such a manner, as to include every place of payment which the law recognises, where none is actually mentioned; for then, he informs us, the law requires payment at the domicil of one of the parties, or on the premises. If there be no day of payment stated, the creditor may expect payment, at his domicil, otherwise he must seek it at that of the debtor, on whom a demand is to be made.

Bartolus and Boullinois consider, in the above cases, the interest paid for money in the contract of *constitution de rente*, or annuity. The rente or annuity, *redditus* cannot exceed the legal rate of interest, and they both teach

Eastern Dist. May, 1829.

DEPAU vs. HUMPHREYS

that this rate must be according to the *lex loci celebrati contractus*, in opposition to the *lex loci solutionis*.

The principle that a contract, valid in the *locus celebrati contractus*, is void, if contrary to the law *loci solutionis*, must establish the converse of the proposition, i. e. that a contract void, according to the former, is valid, if it be so according to the latter.

If this be the case, of what use is it for any legislature to pass a law for the protection of the weak and necessitous?

In some countries, the age of majority is fixed at twenty-five, in others at one and twenty. The minor, who cannot bind himself at home, may do so, if he engages to pay in another country.

Elsewhere, as till very lately here, contracts of suretyship are interdicted to females—they may be deprived of the protection of the laws of their country, if they be prevailed on to engage to pay in another.

A note made at Natchez, which would be null and void, as tainted with usury, according to the laws of the state of Mississippi, if payable there or at Monticéllo, at the distance of several hundred miles, would be perfectly

valid, if made payable at Vidalia, across the river.

Courts of justice must take care that the law be not evaded. In the case of *Stapleton* vs. *Conway*, 1 *Vesey*, 428, 3 *Atkins*, 727, Lord Hardwicke held that, if a contract was made in England, for the mortgage of a plantation in the West Indies, and there be a covenant in the mortgage for the payment of eight per cent. interest, it would be a method to evade the statute of usury, and such a contract would be as much against the statute as any other contract.

The case of *Dewar* vs. *Span*, 3 *Term Reports*, 425, is to the same effect. A bond was given in England, upon the purchase of an estate in the West Indies, with the reservation of interest at six per cent, and notwithstanding it was contended, in argument, that, although the bond was executed in England, it arose on a contract for the purchase of an estate in the West Indies, yet the court unanimously held the bond to be usurious, as if the attempt could succeed, it would sap the foundation of the statute of usury.

In the same manner, if parties could free

Eastern Dist. *May*, 1829.

DEPAU *vs.* HUMPHREYS

themselves from the effect of the laws of their country, by stipulating for payment elsewhere, they would sap the foundation of every law enacted for the weak and necessitous.

The authority of the passage from Voet remains to be examined. This author says: *Si alio in loco graviarum usurarum stipulatio permissa, in alio vetita sit, lex loci ubi contractus celebratus est spectanda videtur, an moderatæ, an vero modum excedentes usuræ, per conventionem stipulatæ sint.*

If in a place, the stipulation of higher interest be permitted, in another forbidden, the law of the place, in which the contract was celebrated, is to be resorted to, in order to ascertain whether the lesser or the greater rate of interest be stipulated by the contract.

Thus far Voet teaches what we have seen Alexander, Bartolus, Burgundus, Everard, Strickius and Boullinois teach, and the contrary of which no other commentator positively asserts, what, in our opinion, every sound principle of law dictates.

But the appellant's counsel urges that Voet, unsays, in the succeeding paragraph, what he appears to have so emphatically expressed.

The words of the second paragraph are *Dummodo meminerimus illum proprie locum contractus, in jure non intelligi, in quo negotium gestum est, sed in quo ut pecuniam solveret se obligavit.*

In the argument, which the appellee's counsel draws, in this respect, he is fully supported, by what is said *arguendo* by Lord Mansfield, in *Robinson* vs. *Bland*, and in some degree, by Judge Kent, in the same manner, in the case of *Van Shaick* vs. *Edwards*, already cited. In endeavouring to ascertain the character of the rate of interest, stipulated in a note given in Massachusetts, Judge Kent says: "had the money, for instance, in this case, been made payable at Albany, or elsewhere in this state, (New-York) then *perhaps* the decision in *Robinson* vs. *Bland*, would have applied."

If, in the second paragraph, Voet meant to introduce an exception, to the rule laid down in the first; if he meant to teach that the legality of a rate of conventional interest, arising not *ex mora* but *tempore contractus* is *exclusively* to be tested by the law *loci solutionis*, even when it is different from the law

Eastern Dist. *May*, 1829.

DEPAU vs. HUMPHREYS

loci celebrati contractus: then, we cannot consider him as affording to us a legitimate rule of decision in the present case, because the weight of his authority is borne down by that of a crowd of the most respectable commentators of the law he cites.

Perhaps, he must be understood, in the second paragraph, to convey to the student a warning, that, by what he teaches in the first, he must not be understood to impugn the proposition, that, in a great degree, the law *loci solutionis*, influences the obligation of the party, who bound himself *ut solveret pecuniam.*

Upon the whole, we must conclude, as we did in *Norris* vs. *Eves* and *Vidal* vs. *Thompson*, that contracts are governed by the law of the country in which they were made, in every thing which relates to the mode of construing them, the meaning to be attached to the expressions by which the parties bound themselves, and the nature and validity of the engagement.

But that, wherever the obligation be contracted, the performance must be according to the law of the place, where it is to take place.

In other words, that in a note executed here, on a loan of money made here, the creditor may stipulate for the legal rate of conventional interest authorised by our law, although such a rate be disallowed in the place, at which payment is to be made.

Consequently, the judge of probates erred in considering Clague & Oldham's note as usurious.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be annulled, avoided and reversed; and this court proceeding to give such a judgment as in their opinion ought to have been given in the lower court, it is ordered, adjudged and decreed, that the plaintiff be recognised and admitted as a creditor of W. Kenner, doceased, for the sum of seventeen thousand seven hundred and ninety-two dollars, ninety-seven cents, and the sum of four thousand seven hundred and eight dollars for interest up to this day, together with interest at ten per cent. on five thousand six hundred and ninety-seven dollars, the balance due on the note, from this date, until paid; and on the balance of the judgment, viz: twelve thousand and ninety-

Eastern Dist. *May*, 1829.

DEPAU vs. HUMPHREYS

five dollars ninety-seven cents, at five per cent. till paid, and costs in both courts.

Livermore for the plaintiff—*Mazureau & Hennen* for the defendants.

KENNER & ALL. vs. *THEIR CREDITORS.*

APPEAL from the court for the parish and city of New-Orleans.

If on a comparison of the day of acceptance, the day designated for payment, and the tenor of the bill, it appears the days of grace were included with those of sight, between the day of acceptance and that designated for payment, that day is the peremptory one of payment, and protest on it is legal.

If the acceptance be not dated, parol evidence is admissible to shew on what day it was made.

MARTIN, J. delivered the opinion of the court. The President, Directors and company of the Bank of the United States and others, complain of the judgment of the parish which denies them, respectively, a place on the tableau of distribution, among the creditors of the insolvents, as holders of protested bills of the latter.

Their pretensions were opposed as those of *Hicks, Lawrence & Co.* whose case was determined last week, on the grounds that the acceptances were not according to the tenor of the bills and the protests were made too soon. —*Vol.* 7, 540.

A material difference, and the only one, between these cases and the former, is that, in this the acceptance had a date, in those, the acceptances were without any.

But the appellants' counsel urge, that they proved, by witnesses, in each case, the day of acceptance, and from a comparison of the tenor of the bill, the date of the acceptance, and the day designated for payment, it clearly appears that both the sixty days of sight, and the three days of grace, were included in the period between the acceptance and the day expressly designated as that of payment, and the conclusion is, that the latter is the peremptory day of payment, and days of grace are not to be added thereto.

They say there is no rule of law, that prohibits the drawer or acceptor, from adding the days of grace to those of sight, and including the whole between the day of acceptance and that which is designated for payment. No such rule has been shown by the counsel of the appellees, who has rested all his objections on the general principle, according to which, days of grace are allowed on all acceptances, according to the tenor of the bill. Giving this principle its full effect, it does not invalidate, an acceptance, in which the days of grace have been included; because, in such cases, the days of grace, which the law adds to those

Eastern Dist. May, 1829.

KENNER & AL. vs. their credit's.

of sight, are in fact added; because the day designated for payment, is the last of the days of grace, which the law would add, if the acceptance was absolute, by the mere signature of the acceptor and date under the word accepted.

It cannot ever be illegal for the parties to *express* in their contracts the obligations, which the law would *imply*, if they were not expressed—where certain consequences legally *result* from an engagement of a particular kind, those, who enter into it, may state them at full length; consequently, when the law has provided that days of grace shall be superadded to those of sight, and the bill shall not be payable before the expiration of the days of grace, it follows that a bill at sixty days sight, being payable on the sixty-third day after the acceptance, the acceptor and holder may well agree that the former shall pay it on that day—because that is what the law would *imply*, had not the parties *expressed* it. In such a case, the days of grace, being evidently included, the acceptance is perfectly legal; the acceptor cannot require that others be superadded.

We are unable to find, in such an acceptance, any ground, on which the drawers or endorsers might contend they were discharged. The holder has fully complied with the engagement he took towards them, of procuring such an acceptance, as would bind the drawee to pay the bill, according to its tenor, on the sixty-third day after presentation. The acceptance has the same force and obligation —whether made in the most common way, by the word "accepted" with a date—the words accepted to pay, at the expiration of sixty days—at the expiration of the days of sight—at the expiration of sixty-three days, or of the days of sight and those of grace.

The difficulty, if there be any, consists in ascertaining the intention of the parties.— When that is done, the legal consequence necessarily follows.

The counsel for the appellees, has, however, strenuously contended that parol evidence of the date of the acceptance was inadmissible, and they claim the benefit of a bill of exceptions, which they took to the opinion of the parish court, by which it was admitted. The authorities they rely on are, *Phillip's evidence*, 423,

Eastern Dist
May, 1829.

KENNER & AL. vs. their credit's.

ch. 10, § 2, 8. *Johnson*, 298. *Norris' Peake*, 119. 3 *Starkie on evidence*, 995, 999, 2 *id.* 579. *Cowen*, 750. *Johnson*, 146. 2 *Bosanquet & Puller*, 509. 3 *Campbell*, 56. 1 *Taunton*, 115, 347. *Chitty com. law*, 142. 1 *Chitty on contracts*, 22. 1 *Mass. reports* 27. 12 *Id.* 92. 8 *Taunton*, 98. 8 *Eng. com. law reports* 468.

One of the writers, cited by the appellee's counsel, *Starkie*, lays it down as a general principle that "evidence is admissible, that a deed was executed or *a bill of exchange made* at a time different from the date."

The cases, stated by *Starkie*, are *Hall* vs *Casenove*, 477, 3 *Levins*, 348, *Giles* vs. *Meeks; Addison*, 384, *Gress & al.* vs. *Odenhemer*; 4 *Yates*, 218, *Fox's lesee* vs. *Palmer & al.* 2 *Dallas*, 214. But on examination we find that they support the position, in regard to deeds only. 3 *Starkie*, 46.

The same author also lays it down, that parol evidence may be received, that a party, in whose name a contract has been made for goods, was but the agent of another. *Id.*

In the case of *Krumbhaar* vs. *Ludeling*, 3 *Martin*, 640, this court held that parol evi-

dence was admissible, to shew that the drawer of a bill drew it as agent.

The Supreme Court of the United States has held that parol evidence was admissible, that a check (on the face of which it was doubtful whether the person, who drew it, acted in his own right or as cashier of the bank,) was drawn on account of the bank. 5 *Wheaton* 286.

And in a very recent case, the Bank of the Metropolis vs. Brent's executors, 1 *Peters* 89, the same court held that parol evidence was admissible of an agreement relative to the place, where payment of the note was to be demanded. In that case, it was contended the testimony ought not to be admitted, because it was an attempt to vary, by parol proof, a written agreement. Chief Justice Marshall, who delivered the opinion of the court, said: "this is not an attempt to vary a written agreement. The place of demand is not expressed on the face of the note, and the necessity of a demand on the person, where the parties are silent, is an inference of law, which is drawn only when they are silent. A parol agreement puts an end to this inference, and dispenses

Eastern Dist. *May*, 1829.

KENNER & AL. *vs.* their credit's.

with a personal demand. The parties consent to a demand, at a stipulated place instead of a demand on the person or maker, and this does not alter the instrument, so far as it goes, but supplies extrinsic circumstances, which the parties are at liberty to supply."

From this authority it follows, that the legal implication, resulting from an instrument, may be rebutted by parol evidence of an agreement to the contrary.

The legal meaning of an instrument, may be explained by evidence of the time and place of its execution.

A contract of endorsement is at present, ordinarily entered into by the mere signature of the party, on the back of the bill. Should the endorser be sued, the measure of damages must be sought, in the laws of the place in which he contracted; and this can only be shown by parol.

On a note, payable on a given day, the number of days of grace and the rate of interest must be sought in the law of the place, in which it is subscribed or made payable—if the place is not stated on the face of the note, parol evidence is certainly admissible.

Parol proof, not only of the place, but of the time an agreement was entered into, is some times important. In such a case, says Starkie, (*loco citato*) "even in the case of records, which are conclusive, as far as regards their substance, averments and proofs may be received to *contradict* them, as to *time* and *place*."

On a bill or note, payable within a limited time after date, when there is no date, the time is to be computed, from the day it issued. *Bailey on bills*, 154.

Where an award, which directed an act to be done, within a certain number of days, had no date, the court held the time was to be computed from the day of delivery.

In both these cases, the time when the bill issued, and the award was delivered, was necessarily to be proven by parol evidence.

If it be argued that in the acceptances, under consideration, the day of payment was written, and therefore there was no necessity to resort to parol proof to ascertain it—the answer is, that a circumstance occurred from which it necessarily results, that the day designated was the peremptory day of payment.

Eastern Dist. *May*, 1829.

KENNER & AL. *vs.* their credit's.

and not that from which the days of grace were to be reckoned; a circumstance which destroyed the implied right, of the acceptor to further delay, in the same manner, as the parol agreement, in the case of the *Bank of the Metropolis* vs. *Brent's executors*, destroyed the implied obligation of the Bank making a demand from the person of the maker.

The inclusion of the days of grace and the agreement that the demand should be made at a particular place, are both circumstances, proof of which, in the language of Judge Marshall, "does not alter the instrument, so far as it goes, but supplies extrinsic circumstances which the parties are at liberty to supply."

If it be objected that, in the cases first cited, the evidence was received between the parties, and in that before the Supreme Court of the United States, the endorser was presumed to be a party to the agreement, this circumstance, in our opinion, cannot vary the right to introduce the parol proof, in the cases now before us. The undertaking of the holder, with the drawer and endorser, is that the former will require the drawee to bind himself to pay the bill, according to its tenor—whatever is en-

dence against the drawee, that he had done so, will be evidence between the holder and drawer and previous endorsers, that the drawee has undergone all the obligations of an acceptor—whether the evidence when received shows such an obligation, on the part of the acceptor, as will bind the drawer and endorser, goes to the effect of the proof, and not to its admissibility.

We conclude that parol evidence of the *time* of acceptance was properly received.

On the opposition of *Hicks, Lawrence & Co.* we held that, when from the comparison of the tenor of the bill, the written date of the acceptance, and the day designated for payment, it clearly appeared that the period between the day of acceptance and that de
nated for payment, included both the
sight and those of grace, we would
that the day designated, was the
day of payment, and no additi
grace were to be claimed or all
That protest on that day was
The appellants, however, ha
according to mercantile usage
the day nominally designated

Eastern Dist. *May*, 1829.

KENNER & AL. *vs.* their credis's.

an acceptance without a date, is the peremptory day.

Fairweather, Cashier of the Bank of *Layland & Bullers*, has deposed that an acceptance, without a date, to pay on a day expressly designated, is not usual, but is occasionally resorted to. It is usual in such cases to include the days of grace, and the day designated is the third of these. He had four bills accepted in this manner; one of them was discounted by the Bank of England; three of them passed through the hands of Bankers in London. By the usage and customs of merchants in England, such a bill is payable on the day designated.

Burrell has deposed that an acceptance
hout a date, to pay on a day expressly de-
is not customary, but when adopted,
esignated is usually the last of those
d by the usage of merchants, pay-
demanded on that day.
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designated is usually the sixty-
of grace included. This form
is used by several houses.
d he has used the same form

for several years—without any objection being made till lately, in consequence of doubts in the United States. The day designated is usually the peremptory day, and the protest is made on it.

Hooth deposed he has always accepted in this manner, for sixteen years, without any objection being ever made. His acceptances have passed through several great houses. The usage has prevailed, ever since he is in business.

Tabor deposed he has been forty years in business as a banker, and has never known any objections to be made to this form of acceptance. It is not unfrequent: a vast number of bills thus accepted, have passed through his hands.

Duncan, one of the drawees, deposed the bills are accepted according to their tenor, and law—the days of grace are included. The form of acceptance is the usual one of the drawees.

Horstman, *Wilkins*, *Drouet* and *Wilson* deposed the form is used by many houses.

The same facts are substantially deposed by several other witnesses introduced by the appellants.

Eastern Dist
May, 1829.

KENNER & AL. vs. their credit's.

The appellees introduced the following witnesses:

Hall deposed there is no general usage, as to protesting a bill at sixty days sight, accepted to be paid on a day designated, without the acceptance being dated. Very few houses use that form of acceptance. He considers it as altogether irregular, and would protest the bill on the day designated, and afterwards *as a matter of precaution*—three days after; particularly, if the acceptor urged he should have days of grace. He would object to receive such an acceptance, for want of a date. The house of *A. Haywood & Sons* have refused to receive, and have sent back bills thus accepted. Since objections have been made, several houses have adopted the form of acceptance with a date.

Henderson deposed that there is no common usage, regulating the protest of a bill, accepted on a designated day, without a date. The acceptance is irregular; he would protest three days after the designated day.

Jordan deposed the acceptance without a date would be irregular, and he would be at a loss about protesting, unless he could prevail

on the acceptor to add a date. The sixty-third day after presentation is the day to protest for non-payment; but by no means not without regard to the form of acceptance; because the commercial usage of England requires a date to the acceptance.

Anderson deposed he never saw such an acceptance, and would not take it, because it is liable to many objections. If he was holder of a bill, thus accepted, he would protest on the day designated. The sixty-third day is the proper day for protesting, without regard to the form of acceptance; provided the acceptance be dated; the date is essential in common usage.

Binn deposed that, presuming the day designated was the sixty-third, he would protest on that day. The proper day of protest is the sixty-third after *sight*, but not without regard to the form of acceptance. He considers the acceptance imperfect, without a date.

Ireland deposed the acceptance would be irregular, and contrary to commercial usage; but if the bill have been accepted sixty-three days before the day designated, the protest should be on that day. The only proper day of pro-

Eastern Dist. *May*, 1829.

KENNER & AL. *vs.* their credit's.

test is the sixty-third after presentation; unless by a special agreement, between the drawee and holder; but such an agreement would discharge the drawer and endorsers.

Luke deposed an acceptance, without a date, is not customary; but if the day designated was really the sixty-third from the acceptance, the protest should be on that day. Common usage requires a date.

Highfield deposed that, presuming the day designated was the sixty-third from the acceptance, he would protest on it. The date is necessary.

Orford deposed the acceptance is irregular. He would think the days of grace were included, and protest, on the day designated.

The result of the testimony offered by the appellants is that, according to commercial usage, a bill at sixty days, accepted to be paid on a designated day, without a date to the acceptance, is payable on that day, without the addition of any days of grace.

The same result is given by the examination of appellee's witnesses. From the nine whom they have produced five, Hall, Henderson, Binn, Highfield and Orford depose they would pro-

test such bill on the day designated in the acceptance, without giving any days of grace—this is to say, that day is the peremptory one, or in other words, the bill is accepted, according to its tenor.

Two of them, Ireland and Luke, deposed that, if the day designated be actually the sixty-third day from the acceptance, then it is the peremptory day—then is the bill accepted according to its tenor.

One witness only, Henderson, thinks the day designated is that, from which those of grace are to be reckoned.

Jordan expresses no opinion.

We cannot resist the impression, left on our minds by the testimony, that, according to usage in England, the bills were accepted, and the acceptors took the engagement of paying them on the day designated in the acceptance, and that protest on that day was regular.

On principles, if we were without other testimony, than that which ascertains the day of acceptance, it would be impossible to distinguish the case of the appellants from that of *Hicks, Lawrance & Co.* Whether the day

Eastern Dist. *May*, 1829.

KENNER & AL. *vs.* their credit's.

of acceptance be written by the acceptor, at the foot of the acceptance, admitted by all parties, or ascertained by legal evidence, if it clearly appears that both the days of sight and those of grace, have been computed and included between that of acceptance, and that designated as the day of payment, the legal consequence must follow. The designated day is peremptory; days of grace cannot be claimed.

Lastly, it has been urged, with great force, that such acceptances are bad, because they leave the day, on which the bill is to be presented for payment, in uncertainty—that the holder cannot know when to protest. Therefore such a mode of acceptance must be proscribed, as leading to confusion and injury to the parties.

The objection may be considered, in rela to those who were parties to the bill, at the period of acceptance, and those who became so after. The former canonly object, when they are resorted to, that the bill was dishonored; that it was not duly protested; that they were not duly notified of the dishonor. Now, if the acceptor had a right to include the days of grace, in the period between the acceptance

and the day designated, the bill was duly honored. As to the uncertainty, appearing on the face of the bill, no authority has been shewn to induce a belief that the drawer, or previous endorsers may claim their discharge, because the day of payment, on the face of the bill is uncertain; *id certum est quod certum reddi potest.* If the objection could prevail, what would become of verbal acceptances, or parol promises to accept, anterior to the drawing? In such cases, the day of presentation must be established by parol evidence, as nothing, on the face of the bill, shews when it becomes payable.

As to those, who may receive the bill *after* such an acceptance, with such an ambiguity on its face, and negotiate it in this state, they have no cause of complaint. No one forced them to receive such a bill, and they took it with the risk, if any, of the uncertainty of the acceptance. *Volenti non fit injuria.*

We think the parish judge erred in erasing the names of the appellants from the tableau of distribution.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court

Eastern Dist. May, 1829.

KENNER & AL. vs. their credit's.

be annulled, avoided and reversed, and it is ordered, adjudged and decreed that the appellants be restored, on the tableau, as creditors of the insolvents for the amount of their respective bills, damages and costs resulting from the protests; the appellees paying costs in both courts.

Livermore & Smith for plaintiffs—*Mazureau & Hennen* for defendants.

KENNER & AL. vs. THEIR CREDITORS.

MARTIN, J. delivered the opinion of the court. A re-hearing has been prayed, by the appellees, opposing creditors of the claim of the *Bank of the United States*, on a judgment we delivered in this case a few weeks ago, on the ground that we erred:

1. In considering the bills, holden by the Bank, as duly accepted and protested.

2. In omitting to notice the objection that the Bank lost its recourse against the insolvents, in consequence of sundry arrangements and transactions with the acceptors.

The arguments, in the petition, present sub-

stantially nothing, that had not been offered, on the hearing, or in the brief, with which the appellees' counsel favored us, all which, in one opinion, was victoriously answered by the counsel for the Bank. On this point, therefore, no re-hearing could be granted.

Before we proceed to examine the second point, it is due to the parties, in favor of whom a re-hearing was solicited, to notice two of the grounds on which the application was made, The errors, into which the counsel have fallen, appear to us very great; the facts are entirely mistated, and on matters too, on which it is strange, the gentlemen could have been mistaken.

In the judgment, we said, "But the appel lants' counsel urge, that they proved by witnesses, in each case, the day of acceptance, and from a comparison of the tenor of the bills, the day of acceptance, and that expressly designated for payment, it clearly appears that both the days of sight and those of grace were included in the period between the day of acceptance and the one expressly designated as that of payment."

On this, the petition observes: "This argu-

Eastern Dist. *May*, 1829.

KENNER & AL. *vs.* their credit's.

ment, as far as we recollect, was never made, and could not, with any degree of propriety, have been made, at the bar, for these plain reasons:

"1. The appellants' counsel could not say, they had proved by witnesses, the day of acceptance; they had attempted, it is true, to prove it, by witnesses; but the attempt had been resisted by us, and the court below had refused to admit the evidence offered, therefore, no body knew what the evidence was, nor what fact could be established; therefore nothing was proved by witnesses, and therefore the appellants could not say it was.

"2. The only question before the court was, as to the admissibility of oral evidence to prove the date. Until the decision of this preliminary question, we could not, nor could any of the parties, nor could the court say the proof was made of the date of the acceptance."

There is on the record an agreement, signed by the counsel of both parties, by which the case is submitted "on the returns to the commissions taken to Liverpool and London.... but the said evidence is subject to all objections, and its admissibility is expressly reserved,

as well as the right to object to the admissibility of any parol evidence on the subject of these bills of exchange. On the appeal, the records may be made up of the tableau and oppositions only. The evidence, under the commissions, may be taken up in original, subject to the above exceptions."

This agreement, far from shewing the evidence was *rejected*, in consequence of a legal exception, shews that it was *admitted*, subject to such exceptions.

The difference, between the two modes of bringing a case before the court, is familiar to the youngest member of the bar, and their effect is quite dissimilar. In many cases, perhaps in the greatest number, parties raise the question on the admissibility of the evidence, in the lower court; and if illegal, it is rejected. This is the most regular mode: in such a case the evidence does not appear on the record, and cannot be noticed by the upper court.—But this course has often the effect of retarding a final decision; for, when the opinion of the supreme court differs from that of the judge *a quo*, the case must be remanded to let in the proof. To avoid this, parties, who are anxious

Eastern Dist. *May*, 1829.

KENNER & AL. vs. their credit's.

for a decision on the merits, admit the evidence, subject to all legal objections, as was done here.

It has been uniformly understood, and never till now doubted, that when the evidence comes up in this manner, this court, if it judges the evidence legal, proceeds to inquire into its effect. The consent of the parties brings the evidence before us, in the same manner, as if it had been admitted below by the judge, notwithstanding an objection to its introduction.

The cousel of the appellants, therefore, with great propriety argued, in the argument, first the legality of the proof, then assuming it to be admissible, contended that it established the dates of the acceptances. This court, consequently did not err in stating that, "the counsel urged that they had proved, by witnesses, in each case, the day of acceptance."

It is not the practice in this court, when a case comes before it, as this did, for the counsel first to discuss the legality of the proof, and after obtaining a favourable decision, to argue on the effect of the proof. The whole case is submitted at once, and all the points it pre-

sents are made. If the court deem the evidence illegal, it rejects it, otherwise it acts on it, and the case is decided on its merits. What is usual in all other cases, what is rignt in every case similarly circumstanced, was done in this, and nothing authorized the assertion that the proof of the day of acceptance was not before this tribunal; that it was not commented on, and duly and properly taken into consideration, in our judgment.

The next point, on which we deem it material to undeceive the parties, is the decision in the case of the claim of *Hicks, Lawrence & Co.* The counsel of the present, who were those of the then, appellees, now state the judgment of the parish court, on that claim, was not appealed from, the case was not before us, and how we could act on it, the counsel profess they do not know. Had the gentlemen, who subscribed the petition for a rehearing, bestowed a moment's consideration on their own conduct, during the hearing of the case of *Hicks, Lawrence & Co.* and afterwards, they would have found an easy and immediate relief from the surprise, which our pronouncing judgment on it, excited. That

Eastern Dist. May, 1829.

KENNER & AL. vs. their credit's.

judgment was rendered, because the case was solemnly argued, both orally and in writing by them, and orally by the opposite counsel, as if a petition of appeal had been actually filed; the testimony, taken in relation to the very bill on which the claim was founded, had been brought up, made a part of our record, and as such, was read, commented on, and submitted to us. Not a suggestion was made, during the argument or after, that the case was not regularly befor us.

By the agreement of parties, the record, on appeal, was to be made of the tableau and opposition only; the evidence was to be taken up in the original. We were, therefore disabled to detect the informality suggested, if it exists. Whether the case was legally before us or not—whether a petition of appeal, bond, citation, &c. might not be dispensed with by consent, or the want of these or any of them, under all the circumstances of the case, cured by appearance, argument and trial on the merits—whether the judgment may be set aside or its execution resisted, on an exception—whether the conduct of the counsel requires our interference or not; it suffices that we

may be resorted to for relief, to render any positive expression of our opinion improper. In the absence of the party, in whose favor that judgment was rendered, its validity cannot be the subject of our enquiry.

Had we committed an error, as is suggested, it would have been one, into which we should have been led by implicit confidence in the character and truth of gentlemen of high standing at the bar; a confidence, which tho' this court may be compelled to abandon— it will painfully and unwillingly relinquish. It could not have occurred to us, that persons, of the description just stated, would argue, both orally and in writing, the merits of a case, in which no appeal had been taken, unless under a strong obligation, subsequently to supply or wave any defect, in the manner of bringing up the case. Such was the reliance, placed by us in the ability and industry of those gentlemen, that we did not deem it necessary to inquire whether a petition of appeal was formally placed on the record, and least of all, could we have supposed, that the persons, who argued a cause, as pending before us, after they

Eastern Dist. *May*, 1829.

KENNER & AL. *vs.* their credit's.

found our judgment, unfavorable, would assert we had acted on a case not before us.

Upon the whole, we must consider the statement, in the petition, for a re-hearing as to the impropriety of our regarding the judgment on the claim of *Hicks, Lawrence & Co.* to be entirely gratuious; the authority of that decision must be the same, on the legal question, whether there was a petition of appeal or not. It is the opinion of the highest tribunal in the state, after hearing the parties, and its force and truth cannot be strengthened, or weakened, by any informality in bringing the appeal before us.

II. Our opinion is, that our attention was not drawn, during the hearing, to the discharge of the insolvents, on account of an arrangement or transaction between the Bank and the acceptors. The petition asserts that it was—and that we desired the counsel of the appellees to postpone any observation, on that head, till after our decision on the legality of the acceptances and protests. On this assertion, notwithstandlng neither of us has any recollection on the subject, we concluded that we said so, or were misunderstood. We there-

fore, granted, the re-hearing on this second point.

It has been contended that the case ought to be remanded, because the parish judge did not speak in his judgment of the objection to the claim of the Bank, resulting from this real or allegal discharge.

It is obvious that this is not a sufficient cause to authorize us to refuse to act, on the whole case. The court below decides a cause, on whatever point it deems material: our duty is to revise its judgment, not the grounds on which it is rendered. Its decision on the merits, requires, nay compels us, to examine the case, on all the grounds which it presents, if that be necessary to a rightful determination of the case; for the error of the judge *a quo*, for which relief is sought at our hands, may be his failure to take into consideration, an objection, on which his judgement is silent. Under the principle contended for, there might be as many appeals, as points in a cause, if he acted on one only at a time, and decided erroneously. It has been the uniform practice of this tribunal, as it is the real intent of the statute, that the decision of the first judge on the mer-

Eastern Dist. *May*, 1829.

KENNER & AL. *vs.* their credit's.

its, brings up the whole case. The contrary doctrine would be productive of intolerable expense and delay.

The first piece of evidence, from which the loss of the recourse of the bank, on the insolvents, is inferred, is an agreement entered into on the 16th of November, 1825, by Brown, as agent of the bank, with the acceptors, of which he promised to procure the ratification by the bank, within a given period.

Without admitting, either that this agreement could have any effect, without the concurrence of other parties, or that, if binding on the bank, the discharge of the insolvents would follow, its counsel has contended that it is not bound, because the agreement was entered into without its authority, was never expressly or impliedly ratified, and every act of the bank, after the agreement came to its knowledge, manifested its unwilliness to be bound by it.

This throws on the appellees the burden of proving Brown's authority. The evidence of this authority, resulting from his possession of the bills, for the bank, might establish his authority to receive payment, but not that of compromising its rights.

There is no proof of any communication from Brown to the bank, nor any knowledge brought home to that institution; no implied ratification can be presumed.

No express one, is alleged.

It therefore follows that the bank is not bound by this agreement, and its recourse against the insolvents is not thereby impaired.

The next piece of evidence, from which the loss of the recourse is inferred, is Brown's receipt, as attorney of the bank, for dividends of the estate of the acceptors. It is unnecessary to inquire whether the receipt had the pretended effect—for, if it had, the bank is not bound thereby, as the money was received, under a power, from which the authority of doing any act, affecting the recourse, was expressly excepted.

Finally, it has been urged, the cause should be remanded, because it must be presumed Brown informed the bank of the agreement, he had entered into in their behalf, previous to the receipt of the power, and if the cause was again before the tribunal of the first instance, evidence could be given to that effect This demand is addressed to the discretion of

Eastern Dist. May, 1829.

KENNER & AL. vs. their credit'rs.

the court. The statute authorises us to remand a cause, whenever justice, in our opinion, requires it. But the necessity of such a step must be apparent. We cannot deprive a party, from rights acquired in due course of law, to enable his adversary to procure proof, which if it exist, he ought to have sought before; unless we have the strongest reasons to believe the proof exists. Now, in this case, the presumption is the other way; or rather the presumptions are equally balanced. If we presume that Brown communicated to the bank the engagement he had taken, previous to the receipt of their power of attorney, we must also presume they communicated their dissent. We have in evidence that the power contained a clause, by which they restricted him from doing any act that might impair their rights on the insolvents. We cannot believe that, after marking out such a cause of conduct, they would soon after, have assented to a transaction, destroying those rights.

The receipt by Brown, of seven shillings in the pound, on the claim of the bank, as a dividend from the estate of the acceptors, reduces the sum they are entitled to, accordingly.

It is therefore, ordered, adjudged and decreed, that our former judgment, so far as it concerns the *Bank of the United States*, be amended; that the judgment of the parish court against them remain annulled, avoided and reversed; and the opposition of the appellees sustained, so far as it relates to a distribution of the claim of the bank, as now on the tableau; that a deduction of seven shillings sterling in the pound, received by its agent, be made thereon, and the claim of the bank placed on the tableau for the balance, without prejudice to the right of the appellees, on the opposition to the appellants' claim for damages, now pending in the parish court. The appellees paying the costs of the appeal, the appellants those before.

Hennen and *Mazureau* for plaintiffs—*Livermore* and *Morse* for Bank of U.S.

The first opinion in this case, was pronounced in April, and was not printed with the cases of that month, on account of a motion for a re-hearing; the second was pronounced in June, and it has been thought best to print it immediately after the other.

In the case of *Hicks, Lawrence & Co.* the date of the acceptance was the *twelfth* of September, and not the fourteenth, as printed.

Eastern Dist. *May*, 1829.

PERCY & AL. vs. MILLAUDON & AL.

PERCY & AL. vs. MILLAUDON & AL.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This is an action by the plantiffs, stockholders in the late *Planters' Bank*, against the defendants, who are also stockholders in the same institution, to obtain a settlement of the accounts, a liqudation of the affairs, and a division of the funds belonging to the bank.

Directors of Banks are required to exercise ordinary care in the discharge of their duties. But if any thing occurs to awaken suspicion of the fidelity of the subordinate officers of the institution, a higher degree of diligence must be exercised. They are responsible in their private capacity for loss arising from any illegal measure of the board of directors which they did not oppose. They are not responsible for errors of judgment unless the error be of the grossest kind. They cannot delegate to the president & cashier the authority to dis-

As necessary to this settlement, the plaintiffs allege, that three of the directors of the institution, viz: *Laurent Millaudon*, *Joseph Abat* and *Jean Lanna*, are indebted to it in a sum of $451,000 for fraudulent and unfaithful conduct by them, while acting in the capacity just stated. The specifications, given in the petition of their acts, are brought under the following heads:

1st. That, while acting as directors, they permitted the president and cashier of the bank, at divers times, between the 3d of August, 1817, and the 3d of November, 1819, to discount notes from the funds thereof, to a large amount, viz: $350,000 without the interven-

tion or assent of five directors, as required by the rules and regulations of the bank, by reason of which misconduct on their part, a loss was sustained by the institution to the amount of $112,000.

2d. That, after the 3d of November, 1819, and the 1st of May, 1820, they, being still directors, did aid and assist *Paul Lanusse*, the president, and *Bailly Blanchard*, the cashier, in discounting notes without the authority of the president and four directors; particularly notes of the president not endorsed, but payable to the president, directors and company of said bank, contrary to the rules and regulations thereof, and to its injury $100,000.

3d. That on divers days and times, between the 1st of June, 1819, and the day of July, 1820, the defendants, being directors of said bank, did collusively and fraudulently cause to be transferred to the bank 800 shares thereof *at par*; although by reason of the misconduct of the defendants, the stock had become of little value, and was then currently sold in New-Orleans at a great loss.

4th. That on the 16th of October, 1819, the defendants were appointed a committee to ex-

count bills or notes.

If they sell stock above the market price to the president the contract is null and void.

So it is if they borrow money of the bank from the cashier, on a promise to replace it, either in cash or bank stock

They cannot discharge themselves from the responsibility they may have incurred as sureties of the cashier by reporting the transactions of that officer to be correct, and obtaining in this report a resolution of the board of directors, to discharge them.

Eastern Dist
May, 1829.

PERCY & AL. *vs.* MILLAUDON & AL.

amine the state of the cash of the bank, after the disappearance of the cashier, and that they fraudulently reported the cash to be correct, whereas in truth it was not so; but there was a deficiency of $49,000 which was attempted to be covered by notes or due bills of *Paul Lanusse*, and for which sum two notes of *Paul Lanusse* were afterwards fraudulently discounted, through the connivance, and with the aid, of the defendants, which notes have not been paid.

5th. That the defendants wilfully, improperly and fraudulently voted to discharge the sureties of the cashier, viz: *Paul Lanusse* and *Jean Lanna*, one of the defendants, and cancel the bond they had given to the bank with said cashier, while at that time he was indebted to the institution in a large sum, viz: $49,000, and also in other sums of money.

6th. That they paid to the cashier and attorney of the bank $5,500 fraudulently and collusively with an intention of injuring the stockholders; and that at divers other times, they improperly paid to other persons large sums of money, which added, to those paid to the attorney and cashier, amount to the sum of 36,000

And 7th and lastly, That when the books of the bank were opened in 1818, and the unsubscribed stock was taken, the defendants failed to pay the amount which they subscribed or to collect that which had been subscribed for by others. That the sum so subscribed for was $126,000, no part of which was paid except the subscription of 100 shares, and that the balance, viz: $106,000 yet remain due and unpaid, for which the defendants are responsible.

Several of the stockholders, who refused to join in this petition, but who were necessarily made parties to the suit in order that a final settlement should be made between all, having an interest in the institution, have answered this petition, by declaring their ignorance of the matters therein alledged, and have required that to be done in the premises, which equity and justice may demand.

The defendants, *Abat*, *Millaudon* and *Lanna*, on whom fraudulent conduct is charged, and against whom such heavy responsibility is invoked, filed an answer in which they deny all the facts and allegations in the petition; more especially those which alledge fraud and

Eastern Dist. *May*, 1829.

PERCY & AL. vs. MILLAUDON & AL.

collusion on their part: and they further aver, that, if in all the acts complained of, any be true, they were the acts of the whole board of directors, done and made in good faith, and free from bad and corrupt intention.

On these issues, the parties went to trial in the court in the first instance. A great deal of verbal and documentary evidence was introduced. The judge was of opionion that, though a gross misapplication of the funds was established, and a consequent loss incurred by the stockholders, there was no proof adduced, which authorsed him to hold the defendants responsible. That the loss was imputable to the improper conduct of the president and cashier. He gave judgment against the plaintiffs, and they appealed.

This case is one of great importance to both plaintiffs and defendants from the large amount in dispute; and of special interest to the latter, as involving charges of the most serious nature against their honesty and truth. It is also of great importance to the public, who from the number of these monied institutions and their influence on the affairs of society, as well as on those whose fortunes are embarked in them,

are deeply concerned in seeing that the agents to whom their direction is intrusted should be protected while they act faithfully; but visited with the severest penalties of the law, if to the injury of the institution, they pervert the trust reposed in them, to their own emolument.

1. The first charge is the permission, given to the president and cashier to discount paper without the intervention and assent of four directors, as required by the 10th section of the act of incorporation.

Before proceeding to state the evidence, by which this charge is supported, and the effect to which in our judgment it should be entitled, it will be well to ascertain, and settle, the degree of care and diligence which the law required in the defendants, while exercising the trust of bank directors, and what responsibility such a situation imposed on them.

On this point, though there is some, we do not conceive there is much difficulty. They were the agents or mandatories of the stockholders, and as such undertook the management of its affairs, according to the rules prescribed by their charter, and by the bye, laws made in pursuance thereof. By the provisions

Eastern Dist. *May*, 1829.

PERCY & AL. vs. MILLAUDON & AL.

of the civil code, in force at the time the trust was undertaken, and at the period the breach of it was alledged to be committed, agents or attorneys in fact were made responsible not merely for infidelity in the management of the affairs intrusted to them, but also for *their fault. C. Code, p.* 124, *art.* 17. The only correct mode of ascertaining whether there was fault in an agent, is by enquiring whether he neglected the exercise of that diligence and care, which was necesary to a successful discharge of the duty imposed on him. That diligence and care must again depend on the nature of the undertaking. There are many things which, in their management, require the utmost diligence, and most scrupulous attention, and where the agent who undertakes their direction, renders himself resposible for the slightest neglect. There are others, where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices.

The directors of banks from the nature of their undertaking, fall within the class last mentioned, while in the discharge of their or-

dinary duties. It is not contemplated by any of the charters, which have come under our observation, and it was not by that of the Planter's Bank, that they should devote their whole time and attention to the institution to which they are appointed, and guard it from injury by constant superintendance. Other officers on whom compensation is bestowed for the employment of their time in the affairs of the bank, have the immediate management. In relation to these officers, the duties of directors are those of controul, and the neglect which would render them responsible for not exercising that controul properly, must depend on circumstances, and in a great measure be tested by the facts of the case. If nothing has come to their knowledge, to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible.

It is said by a writer of great authority who

Eastern Dist. *May*, 1829.

PERCY & AL. *vs.* MILLAUDON & AL.

treats of the doctrine of mandate, that the mandatory cannot excuse himself by alleging a want of ability to discharge the trust undertaken. That it will not be sufficient for him to say he acted to the best of his ability, because he should have formed a more just estimate of his own capacity before he engaged himself. That, if he had not agreed to become the agent, the principal could have found some other person willing and capable of transacting the business correctly. This doctrine, if sound, would make the attorney in fact responsible for every error in judgment, no matter what care and attention he exercised in forming his opinion. It would make him liable to the principal in all doubtful cases, where the wisdom or legality of one or more alternatives was presented for his consideration no matter how difficult the subject was. And if the embarrassment, in the choice of measures, grew out of a legal difficulty, it would require from him knowledge and learning, which the law only presumes in those who have made the jurisprudence of their country the study of their lives, and which knowledge often fails in them from the instrinsic difficulty of the subject, and

the fallibility of human judgment. *Pothier traite du mandat, No.* 48.

It is no doubt true, that if the business to be transacted, presupposes the exercises of a particular kind of knowledge, a person who would accept the office of mandatory, totally ignorant of the subject, could not excuse himself on the ground that he discharged his trust with fidelity and care. A lawyer, who would undertake to perform the duties of a physician; a physician, who would become an agent to carry on a suit in a court of justice—a bricklayer who would propose to repair a ship, or a landsman who would embark on board a vessel to navigate her, may be presented as examples to illustrate this distinction. Thus it was a provision of the Spanish law.—*Gran culpa es aquel que se trabaja de facer cosa que non sabe, o que le non conviene.—Par.* 7, *ttl.* 34, *ley* 5. But when the person who is appointed attorney in fact, has the qualifications necessary for the discharge of the *ordinary duties* of the trust imposed, we are of opinion that on the occurrence of difficulties, in the exercise of it, which offer only a choice of measures, the adoption of a course

Eastern Dist. *May*, 1829.

PERCY & AL. vs. MILLAUDON & AL.

from which loss ensues cannot make the agent responsible, if the error was one into which a prudent man might have fallen. The contrary doctrine seems to us, to suppose the possession, and require the exercies, of perfect wisdom in fallible beings. No man would undertake to render a service to another on such severe conditions. The reason given for the rule, namely, that if the mandatory had not accepted the office, a person capable of discharging the duty correctly, would have been found, is quite unsatisfactory. The person who would have accepted, no matter who he might be, must have shared in common with him who did, the imperfection of our nature, and consequently must be presumed just as liable to have mistaken the correct course.—The test of responsibility therefore should be not the certainty of wisdom in others, but the possession of ordinary knowledge; and by shewing that the error of the agent is of so gross a kind, that a man of common sense, and ordinary attention, would not have fallen into it. The rule which fixes responsibility, because men of unerring sagacity are supposed to exist, and would have been found by the principal, appears to us essentially erroneous.

With this exposition of the duties imposed on the defendants, as directors of the bank, and the responsibility incurred by them, we proceed to the examination of the first charge contained in the petition.

The evidence on this head establishes the fact of a permission having been given, by the board of directors to the president and cashier to discount paper, which was at a longer date than 60 days, and it is also proved that two of the defendants *Abat* and *Lanna*, were present when this power was granted on the 13th August, 1817. But it is shewn that a few days after, in consequence of a protest very properly, and judiciously made by one of the directors, *De la Croix*, before a notary public of this city against the legality and correctness of the proceeding, the order granting the permi ssion was repealed. This repeal took place on the 24th September of the same year, and was made on the motion of one of the defendants, *Millaudon*. Had it been proved that an injury was sustained by the bank in consequence of this impoper indulgence, accorded to its officers, we should have been of opinion that all the directors present at the deliberation

Eastern Dist. *May*, 1829.

PERCY & AL. *vs.* MILLAUDON & AL.

of the board, who did not oppose the measure, would have been responsible to the stockholders in their individual capacities. It was an open and gross violation of the charter, which requires the president and four directors to constitute a *quorum* for discounts, and it cannot be excused on the want of knowledge of its impropriety, for it was a matter on which no dificulty could exist; the language of the statute being clear, and its meaning plain. But, during the time this order was in force, it is not shewn that any discounts were made by the president and cashier from which loss was sustained by the bank. It is true, we have proof that after this time, the cashier secretly advanced the president money on his notes, but there is not a *scintilla* of evidence that the defendants had any knowledge of his doing so, or that they connived at his misconduct in this particular. We therefore conclude this charge has not been sustained.

II. The second accusation is in substance the same as the first; and is equally unsupported by proof. It alleges fraud in the defendants by their assisting the president and cashier to discount paper, between the 3d day of Novem-

ber, 1819, and the first day of May, 1820, without the aid and intervention of four directors. Now it is established, beyond all doubt, that the cashier disappeared and (as it was afterwards discovered) put a period to his existence on the 16th of October, of that year, and that *Lanusse* resigned his office of president on the very day on which it is alleged the connivance on the part of the defendants commenced, viz: on the 3d day of November, 1819.

III. The third specification of misconduct is the acts of the defendants, in transferring to the bank a large number of shares, to the amount of $160,000 at par, when it was well known to them, and so the fact was, that the stock, at the time the transaction took place, was not of the value at which it was transferred.

This is the part of the case which has created the most difficulty in our minds, and the effect, which the evidence is entitled to, cannot be properly understood, without a full statement of all the matters connected with the transaction.

So far back as the year 1813, we find a reso-

Eastern Dist. May, 1829.

PERCY & AL. vs. MILLAUDON & AL.

lution of the board of directors to purchase stock of the bank to the amount of $20,000 at twenty per cent. below par. On the 10th July, of that year, 23 shares were taken from a house which was unable to pay its notes. On the 13th September, another resolution was entered into to purchase stock at not more than ten per cent. below par, so that the stock might be reduced to $200,000. By the first of April, 1815, we see the determination had been so far carried into effect, as to make the stock held by individuals amount only to $225,600. That owned by the bank on the same day was $201,800.

In the commencement of the year 1818, an attempt was made, by persons not stockholders in the bank, to take the portion of stock which up to that time had not been subscribed for.—The board of directors refused them permission to do so, but afterwards opened the books and took the whole stock in their own names, for themselves and on behalf of those who were stockholders at the time. The capital being increased, we find on the 3d of April, a resolution of the board of directors was passed, two of the defendants, *Lanna* and *Millaudon*,

being present, which is in the following words: "considering the scarcity of specie, it was resolved that the president be authorised to buy shares of the bank *not above par* and the stock of the institution not to be less than $200,000."

Between the date of this resolution, and the first day of October, 1819, some shares were purchased, among others, 45 from the defendant, *Lanna*, at par, on the 29th June, 1819; but on the 10th October, 1819, it appear from the book of dividends that $300,000 was then held by individuals, and that they were paid their dividends on this amount.

Such being the amount of stock at that time, we learn by a statement made by the cashier eight days after, and eight days before he committed suicide, that $75,000 had been purchased on account of the institution within the preceding week; and that he held the defendant, *Lanna's* notes for $25,000 to represent stock to the same amount, which sum added to $75,000 reduced the stock down to the amount it was directed to be brought by resolution of the 3d April, namely: to $200,000.

It would greatly have aided the court, in its

Eastern Dist. May, 1829.

PERCY & AL. vs. MILLAUDON & AL.

investigation of this matter, if the evidence afforded any clue, by which we could ascertain whose stock was purchased between these two periods of time, namely: the first and eighth of October, and at what rate it was brought. But there is an hiatus in the transfer book from the 26th September, 1819, to the 15th October of the same year, the time at which those transactions took place. The leaves appear to have been cut out. It would be improper in the court to indulge in any suspicion as the cause of this mutilation of the book, or by whom it was made, for there is no evidence before us, it was in its present situation, when it came out of the possession of the defendants. The plaintiffs have offered to supply, by parol evidence, in this tribunal, the contents of that portion of the book which is wanting, by copies taken from it when it was entire, but such evidence, not having been given below, could not be received here.

We cannot, however, disguise our impressions of the extraordinary character of the transaction. The cashier, sometime before he disappeared, must have been aware of the impending ruin which awaited the bank and him-

self. That at such a time and under such circumstances when the institution was pressed for money, and without specie to meet its engagements, he and the president, whose existance was at stake, or what is more dear to a feeling mind, whose reputation and good name depended on sustaining the credit of the bank, and preventing the disclosure of their misdeeds; that they at such a moment should pay out $100,000 for bank stock is almost beyond credence. If indeed the persons whose stock was thus taken at that time, were those to whom money had been privately advanced, an explanation is given, which tho' it shews highly culpable conduct on the part of the cashier and president, still enables us to account for their conduct on the ordinary principles of human action, but in any other view we have been able to take of the subject, their motives are inexplicable.

The presumption of this stock not having been transferred, in consequence of a sale duly and *bona fide* made to the president, in pursuance of the resolution of the 3d April, 1819, is much heightened by the statement of the cashier, that there was in the vaults of the

Eastern Dist
May, 1829.

PERCY & AL. *vs.* MILLAUDON & AL.

bank on the 8th October, notes of *Jean Lanna*, one of the defendants, for $25,000, which represented the same value in stock. These notes, we presume, were not given without value received, and the transaction only admits of two explanations; either the notes were given for money of the bank loaned by the cashier to the defendant, and the former thought proper to consider them as standing in the place of stock, or the money was obtained on a bargain for stock, by which the cash was immediately paid, and the stock was to be transferred at some future time. In either point of view, the agreement was equally reprehensible on the part of the defendant, *Lanna*. It was a breach of duty as flagrant as that of the president and cashier. There is no safety for monied institutions, if directors, who are appointed by the stockholders to attended to their affairs, and are placed as a check over the other officers of the bank, shall profit by the influence their station confers, to draw money out of its coffers, in any other way but by the legal and ordinary modes, and we doubt much whether the legality of the transaction can be cured by giving any thing else in payment, un-

less it is shewn to have been as beneficial to the institution, as the money improperly obtained would have been. The disposition, which must be made of the cause at present, does not render it necessary to express a definitive opinion on this point, but our present impressions are, that any contract, or agreement, by which the director of a bank obtains money belonging to it, from any of its officers, contrary to the rules of the institution, is null and void, and that no subsequent consummation of that contract supposing it to be executory, can cure the nullity.

From whom, and on what terms, the balance of the stock found in the vault, viz: $75,000, was obtained, the evidence leaves us in the dark. The books shew no regular transfer of it. A serious question therefore presents itself, whether the defendants were justified in reporting as correct, transactions of the cashier, by which this stock stood in the place of cash. It is in evidence before us, that the defendants, previous to their proceeding to an examination of the vault, were informed of the culpable transactions, which had long existed between the cashier and the president;

Eastern Dist. *May*, 1829.

PERCY & AL. *vs.* MILLAUDON & AL.

and were also instructed that the books theretofore kept, did not exhibit the true state of the bank. This information, joined to the fact of the cashier having disappeared, was certainly sufficient to put them on their guard, and it is difficult to believe they then considered the stock worth par; under these circumstances, if they found a quantity of certificates of stock, on which the cashier had advanced money without obtaining a regular transfer of them, we do not think they acted judiciously in receiving them as cash, unless there was strong doubts of the solvency of those to whom the money had been paid. But if the stock was their own, and the title to it was not in the bank, a much higher degree of responsibility was incurred by their reporting the transaction to be correct.

We are inclined, however, to think that if the certificates so found, were those of persons other than the defendants, that they should not be held responsible; on the ground, that on finding the certificates there, they supposed the whole transaction correct, and that they presumed these evidences of stock had come regularly into the hands of the cashier. In

the confusion and alarm necessarily attendant on the disappearance of that officer, while the doors of the bank were besieged by the multitude, who demanded payment of its notes, it would not be surprising if their enquiry was not so complete, nor their judgment so correct, as it would have been under other circumstances. But if it should turn out on a further investigation that this stock was their own, that it had not been transferred, so as to make the contract binding on the bank, or sold above the market price; and that they reported it to stand correctly in place of cash, then we should be of opinion that no statement of theirs, pronouncing the transaction regular, could at all place them in another situation than they would have stood in, had no such report been made; and that, if no regular transfer existed of the stock at the time the cashier disappeared, the defendants still owe the money, they obtained on the deposit of it.

The counsel for the plaintiffs has proposed a mode of ascertaining to whom the stock belonged, which he considered infallible. We

Eastern Dist. *May*, 1829.

PERCY & AL. *vs.* MILLAUDON & AL.

have endeavored to avail ourselves of it; but we have been unable to come to a satisfactory conclusion, by the means indicated. An examination of the names of the persons, who held the stock on the first day of October, 1819, compared with those who were owners of it, at a subsequent time, would, if a difference existed between them, certainly raise an almost irresistible presumption; that the stock found wanting at the last period, was that which had come into the hands of the cashier in the intermediate space of time. But this fact does not establish whether the stock so wanting, came into the hands of the cashier, by a regular transfer; in consequence of a sale made to the president, or by private agreement with the cashier. We therefore think the justice of the case requires it to be remanded. The parties, being now apprised of the point which the court considers material, will be enabled to come prepared to elucidate it with all the proof in their possession, or within their reach.

As the case is one of great magnitude and embraces a variety of matter, we have thought the ends of justice would be promoted by ex-

pressing an opinion on the other heads of accusation alledged in the petition. It will narrow the grounds of contest on the next trial, and promote the discovery of truth by confining the attention of the parties in the court below, to what is really material.

IV. The fourth ground, on which responsibility is alleged is the report of the defendants when appointed to examine the officers of the bank, after the disappearance of the cashier; their reporting the cash to be correct, when there was a deficit of $49,000.

The report, made by the defendants, is found on an entry made on the book of deliberations, in the following words: "On *Mr. Lanna's* motion, resolved, that all the transactions of this bank, as well as the vault and promissory notes, acceptances and bills receivable in the port folio, having been found correct, according to the statement of the book keeper, the late *Bailly Blanchard* be discharged, and his bond considered as void.

The propriety of this report, as preliminary to a motion for the discharge of the cashier and his secureties, will be considered hereafter. In reference to this accusation, altho' it did not

Eastern Dist. *May*, 1829.

PERCY & AL. vs. MILLAUDON & AL.

state the facts correctly, it does not authorise us to hold the defendants responsible. It is proved that a great deal of zeal and activity, judiciously exercised, were displayed by the defendants to secure the debt which ***Lanusse*** owed for ***overdrawing***, that security was obtained for it, and that it was paid. It is also shown that every exertion was made to secure the balance due by him on the notes discounted. Whatever therefore may have been the motives of the committee in making the report, as the bank was not placed in a worse situation than it otherwise would have been, in relation to ***Lanusse***, we do not think the plaintiffs can fix responsibility on the defendants, on this ground.

V. The next accusation is the note given to discharge the cashier's bond, and of all the transactions which this litigation has developed, it appears to us the most unjustifiable. It exhibits gross and culpable negligence on the part of two of the defendants, ***Abat*** and ***Millaudon***, and on the part of the other, ***Lanna***, who was surety, an attempt to deceive the bank to his own advantage. The defendants formed the committee which had examined the vault.

They were apprised of the culpable conduct of the cashier. They had full evidence of it, furnished under his own hand, before the unfortunate man terminated his existence by a voluntary inflicted death. They knew the distress to which the institution was reduced, was owing to his, and the president's breach of duty. Yet with a perfect knowledge of all these facts, *Lanna*, the surety, moved the board to discharge the cashier, and consider the bond void, *every thing be found correct;* and the other defendants made no opposition to it. The most charitable construction of motives can find little or no apology for such conduct.

There is no doubt the defendant *Lanna* is still responsible on the bond, and whether judgement cannot be given against him, on the present state of the pleadings is a question we reserve until the case be finally decided, as we do the responsibility of the defendants, *Abat* and *Millaudon*, for permitting such a determination to be taken without opposition on their part.

VI. As to the charge of voting sums to the officers of the bank, in addition to their salary, we do not see any thing which may not

Eastern Dist. *May*, 1829.

PERCY & AL. *vs.* MILLAUDON & AL.

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Eastern Dist. May, 1829.

PERCY & AL. vs. MILLAUDON & AL.

be reconciled to a wish to reward zeal and merit, or what they considered such, in the service of the institution.

But one of the payments, that of $1000 to the attorney of the bank, stands on different grounds. The resolution granting it, is of date the 25th March, 1820, and the following is a translation of the order, which was signed by two of the defendants, *Abat* and *Millaudon*: "*Resolved*, That in case a suit is brought by the stockholders, against the president and directors of the bank, that *Mr. A. L. Duncan* will be employed to defend the latter, and that $1000 be allowed him for his services." When bank directors are in contest with the stockholders, and the fidelity and prudence of the agency of the former are at issue, we think each should pay their own counsel. There is just as much ground, for making the directors responsible for the attorney the stockholders would employ.

VII. The seventh accusation is completely disproved. It is shewn that all the stock subscribed for, has been paid.

It is therefore ordered, adjudged and decreed that the judgment of the district court be an-

nulled, avoided and reversed, that the case be remanded for a new trial, and that the appellees pay the costs of this appeal.

Hennen for the plaintiffs—*Mazureau* and *Grymes* for the defendants.

WEIMPRENDER vs. *FLEMING*.

APPEAL from the court of the first district.

A party cannot proceed, at once, by the *via executiva* and the *via ordinaria*. If he do, the order of seizure is to be set aside.

The plea of *non num. pecunia* cannot be resisted by evidence on an existing note.

MARTIN, J. delivered the opinion of the court. The plaintiff claimed a sum of money lent to the defendant, under a notarial act, by which two slaves were mortgaged by the defendant. There was a prayer for citation and judgment, and a writ of seizure and sale was obtained.

The defendant pleaded that neither the petition or citation were served on him in the French language; that proceedings could not be carried on at once, both by the *via ordinaria* and *via executiva*—the exception of *non numerata pecunia*, and the general issue were added.

The plaintiff filed a supplementary peti-

Eastern Dist. May, 1829.

WEIMPRENDER vs. FLEMING.

tion, by which he stated the consideration of the mortgage. To this the general issue was pleaded.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

The appellant's counsel has urged that:

1. The dilatory exceptions, particularly that on joining the *via executiva* to the *via ordinaria*, were incorrectly overruled.

2. The plea of *non numerata pecunia* could only be met by evidence of the numeration of the money, as stated in the act, not by proof of a pre-existing debt.

3. Such evidence was excepted to and inadmissible.

The exception to the want of service of copies, in the French language, of the petition and citation, was properly overruled, as there is neither allegation or proof, that that language is the vernacular one of the defendant.

That to the joining of the two ways, in the same petition, was properly disposed of, by the dismissal or setting aside of the order of seizure and sale—but the judge erred in not doing so, at the costs of the plaintiff.

The notarial act states the defendant ac-

knowledged himself indebted to the plaintiff for money lent. The plaintiff has urged that the plea of *non numerata pecunia* came too late after two years—this proposition is incorrect in point of fact. The notarial act is of May third, 1821, and the exception was pleaded on the tenth of May, 1822.

The notarial act states the money, for which the mortgage was due, was loaned by the plaintiff to the defendant; the supplemental petition states the defendant owed several minors represented by the plaintiff, and being unable to pay, craved an extension of credit, which was granted, on his binding himself to pay the plaintiff, and to allow him ten per cent. a year interest. This was a loan *brevi manu*, and if a higher rate of interest had been stipulated, evidence of the fact would have supported a charge for an usurious loan. The plaintiff, by this transaction, became liable to the minors, in the same manner as he had counted off the money to the defendant, and received it back in discharge of the claim of the minors.

It is therefore ordered, adjudged and decreed, that the judgment of the district court,

East'n District. May, 1829.

WEIMPRENDER vs. FLEMING.

so far as it allows full costs to the plaintiff be annulled, avoided and reversed, and that the plaintiff and appellee pay costs in this court, and in the inferior court up to the day of the dissolution of the order of seizure and sale, and the defendant and appellant pay costs below, from that time, and that, as to the rest, the judgment be affirmed.

Soule for plaintiff—*Hennen* for defendant.

BAUDIN vs. *ROLIFF & AL.*

In a sale under execution, if the terms be that as soon as the buyer pays, the title will pass; he must pay before he acquires it.

APPEAL from the court of the third district, the judge of said district presiding.

PORTER, J. delivered the opinion of the court. This cause has been already before the court, and was remanded to have the question of alleged fraud in the conveyance to the defendants tried by a jury. The whole case has been submitted to them, and a verdict has been given for the plaintiff, from the judgment rendered in conformity therewith.

A full statement of the case will be found in the former opinion, rendered by this tribunal, a report of which is given in the first volume of

the new series of *Martin's Reports*, 165. It is sufficient for the understanding of the decision now about to be pronounced, to state:

That the suit is one for land, and that the plaintiff claims a title to the premises in dispute in virtue of a purchase, made by him from one Alston, who bought at a sale made under an execution issued at the suit of the present plaintiff, and one Conway, against a certain Oliver Pollock, their debtor. The defendants contend, that by the terms of the adjudication, as well as the general principles of law in matters of this kind, no title ever passed to Alston, and that consequently none could be acquired by the petitioner under him.

The sale took place under the Spanish government. The adjudication is in the following words "no bidder having appeared except the said Don P. Lewis Alston, he is considered, as he is, the lawful owner of said land and plantation of one thousand arpents, that did belong to Don Oliver Pollock, as he is the last and better bidder, for the sum of $5360, in virtue of which, I have signed this, with the two assisting witnesses, appraisers, and their witnesses, *as soon as he pays the said sum of* $5360."

East'n. District. May, 1829.

BAUDIN vs. ROLIFF & AL.

Two questions are presented under this adjudication.

First, whether any title passed to Alston, until he paid the purchase money? and

Secondly, whether it has been so paid?

We think there can be no doubt but the condition was that which our law denominates suspensive, depending on a future event. The purchaser is declared to be the lawful owner of the land, *as soon as he pays the money bid*; he is, therefore, not the owner, *until the money be paid*.

But it is contended, though the money was not actually paid, yet this was a question entirely between the plaintiff in execution and the purchaser, and that, if the former thought proper to release or discharge the latter, or take any thing else in lieu of the money, the debtor cannot complain, and the title is not less vested in the buyer. This position we consider true, provided no act between the plaintiff and the bidder deprives the defendant of the benefit of the sale made of his property. But to this doctrine, there are obviously the exceptions which grow out of purchases made on certain conditions and stipulations: For, if the parties choose to make a particular agreement on this,

or on any other subject, their contract is the law which governs *them*, unless the agreement be void, as contravening some principle of public policy.

The plaintiff in the present action, together with one Conway, were the persons at whose suit the property now in dispute was sold in execution, and purchased by Alston. Pollock, the owner of the land, owed the petitioner a balance of a large judgment which the latter had recovered against him several years before, and was also indebted to Conway, who, as his surety in that suit, had paid Baudin a considerable sum of money, in discharge of the debt due by Pollock. They joined in a petition to the Spanish tribunals for a sale of the land; and as Conway was still surety for Pollock, it of course followed, that whatever money could be made from the sale of the defendant's property was to be first applied to the satisfaction of the judgment in favor of Baudin. The balance, if any, was to be paid to Conway, the surety.

Years elapsed after the sale without the money being paid by Alston, the purchaser, or any steps being taken by Baudin or Conway to enforce the payment. In the year 1814, Bau-

East'n. District. May, 1829.

BAUDIN vs. ROLIFF & AL.

din commenced an action against the heirs of Alston, requiring them to be put in possession of the land on their paying the sum of $5360, the purchase money, or that in default of their making said payment, the land should be sold to pay and satisfy the debt due to the petitioner, In the petition, he states the sum, yet due to him by Pollock, to be $8800, with interest and costs. To this demand the defendants appeared and answered, and, after considerable litigation, the cause terminated in April, 1817, by a judgment, which decreed that the plaintiff should recover of the defendants the sum of $5350, to be paid, however, as the judgment states, "by the defendants to the petitioner, by the sale of the right, title and interest of the said defendants to the said tract (the land purchased by their ancestor) which is hereby ordered to take place in due form of law; and it is further ordered, that if, at the sale hereby directed, the said land shall not sell for the above mentioned sum, the said defendants shall not be liable to pay to the petitioner any further sum than the proceeds of the sale to be made of the said tract of land, and that they be forever released from any further liability to the said petitioner on account of the

demand made in his petition. This decree is not to affect the rights of any other party or parties, than those above named; and it is further ordered, that the costs of the suit be paid from the proceeds of the sale above ordered."

Under this judgment, an execution issued, the land mentioned in it which is that now sued for, was seized, sold, and bought by the plaintiff, for the sum of $4490.

Whether the judgment was entered up by consent, or was rendered by the court on considerations of the equity, as well as law of the case, does not appear, nor is it very material to enquire. The plaintiff by not appealing *from it*, and by carrying it into execution, is as much bound by it, as if it had been preceded by his assent.

The effect of it, it is contended, was to discharge the purchaser; that the plaintiff had a right to do so in any manner he chose: that the title vested in Alston, by satisfaction being made in this way as completely as it would have done by the payment of the purchase money.

This is true: but Baudin could not discharge the defendant in execution for a larger sum than was due to him. By the original sale,

East'n. District. May, 1829.

BAUDIN vs. ROLIFF & AL.

Alston had purchased the premises for $5360, which money was to go, first, to the satisfaction of the balance due on the judgment to Baudin, and the remainder, if any, to be paid to Conway.

Now, if the whole amount for which the land was sold to Alston was not due to Baudin, then, he could not discharge the purchaser for the whole, and if Alston did not pay the whole amount, or was not released for the whole, no title vested in him; for, by the express terms of his purchase, he is not the owner, until he pays the entire amount, viz: $5360.

Conway was no party to the proceeding. He could not be bound by them, and a judgment by which Alston's heirs were to be discharged by the sale of the land cannot affect him. They yet owe to him the balance due between the amount coming to Baudin, and that at which their ancestor purchased, unless they have some other cause to shew against the debt, than that proceeding from the judgment, rendered between Baudin and them.

The plaintiff, by his own shewing only, establishes the amount due to him at that time to be $4300. The defendants insist it does not exceed $2468. It is immaterial what we adopt, though we may remark that we have

been unable to find any evidence or record that will carry the balance as high as the plaintiff states it. Either will bring us to the same result, for neither amounts to the purchase money which Alston was to pay. It has been argued that the $4300 due Baudin, with the costs of the suit, against Alston's heirs, which were directed to be paid out of the sale of the land, amounted to $4490, the price at which he purchased it. Admitting this to be true, $4490 were not the price at which the land was originally sold, but $5360, and the payment of this sum, or a discharge from those entitled to receive it, was necessary to give a title to Alston, for it was on that condition he purchased.

Lastly, it has been contended that no person can set up this defence but Conway, or his heirs; that the defendants cannot, who are entire strangers to the transaction. They are in possession of the land. The action is a petitory one. The plaintiff must shew title. That which he produces shews the title of Pollock never was vested in the party in whose right he claims. He, consequently produces nothing which could authorize the court to declare him to be the owner of the property sued for.

East'n. District. *May*, 1829.

BAUDIN vs. ROLIFF & AL.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that there be judgment for the defendants as in case of nonsuit, with costs in both courts.

Moreau & Watts for the plaintiff—*Preston* for the defendants.

ROBINSON vs. *M'CAY, CURATOR.*

The landlord's privilege is not lost, by the curator's removal of property subject thereto.

APPEAL from the court of probates of the parish of St. Tammany.

PORTER J. delivered the opinion of the court. The plaintiff claims $488 for house rent, and asserts that the debt is privileged, on the furniture and other moveables found in the house at the decease of the tenant.

The answer contains a general denial, a plea of prescription, and averment that the debt is not privileged.

The court below considered the debt as proved, and the plea of prescription not sustained, but it refused to allow any privilege, and directed the plaintiff to be paid as a chirographary creditor. From this judgment the petitioner appealed.

The reason given by the judge for rejecting the demand of the plaintiff to be paid as a privilege creditor, is the curator being permitted to remove the objects subject to the law, without any assertion of claim on the part of the lessor. *Lou. Code*, 2679.

We think the judge erred. The representatives of an estate can do nothing which will destroy or impair a claim existing on the deceased's person or property, at the moment of his decease. In this instance, the removal by the curator cannot have the effect of destroying the privilege, because the lessor could not exercise his privilege on the thing subject to it. The law makes it the duty of the former to take the property into his possession, sell it, and after the sale to settle the order of privileges contradictorily with the other creditors. This power is expressly recognized by the 3223d article of the *Louisiana Code*. The proceeds in the hand of the curator represented the thing. The want of power in the lessor to seize, prevented the prescription from running against him.

It is therefore ordered, adjudged and decreed, that the judgment of the court of pro-

East'n. District. *May*, 1829.

ROBINSON *vs.* M'CAY.

bates be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that the plaintiff recover from the defendant as curator of the estate of H. H. Patillo, the sum of $488; to be paid as a privilege on the moveable effects of the lessee found in the house leased at the death of the lessor; and it is further ordered, that the defendant aforesaid, pay the costs in both courts.

BRYAN vs. *TURNBULL & AL.*

The words of a prison bound bond need not be essentially the same, as those of the form in the act.

The sureties on it, cannot discharge themselves by surrendering the principal.

APPEAL from the court of the third district, the judge of the second presiding.

PORTER, J. delivered the opinion of the court. The plaintiff brought suit against one Stewart, and obtained judgment against him. He was arrested on a writ of *capias ad satisfaciendum*, and gave the defendants as sureties to keep the prison limits. The petition charges the debtor to have violated his engagement by departing from the limits of the prison, and avers the responsibility of the defendants as a consequence of said departure.

The answer consists of a general denial, and an averment that there has been no breach of

the condition of the bond, because the respondents took the body of Stewart and surrendered him into the custody of the deputy sheriff, who was jailor of the parish, and that the sheriff, after this surrender, permitted Stewart to depart from the limits. The court below gave judgment against the defendants and they appealed.

Two points have been made in this court.

First. That the bond does not pursue the statute under which it was taken, and is void.

Second. That the surrender of the debtor into the custody of the sheriff discharged the sureties.

I. The condition of the bond is in the following words: "Whereas on the 17th day of March last, there was issued from out of the clerk's office of the third judicial district, in the parish of West Feliciana, and state of Louisiana, a writ of *capias ad satisfaciendum*, at the suit of Mary S. Bryan against Charles Stewart, and the said Charles Stewart having surrendered his body to the sheriff, in execution of said writ. Now, therefore, if he, the said Charles Stewart will keep within the limits of the prison bounds, of said parish of West Feliciana, and state aforesaid, which bounds are

East'n. District. *May*, 1829.

BRYAN vs. TURNBULL & AL.

prescribed and set a part by the parish judge and two justices of the peace, in conformity with the law in such cases made and provided, (it being the limit of the parish,) and not depart therefrom, without paying or satisfying the said Mary S. Bryan or her legal representatives the sum of $2682 21-100; ten per cent. interest on the sum of $2922 21-100, from the 24th of May, 1825, until the 20th of November, 1826, and like interest on $2682 21-100, from the last date until paid, also the sum of $22 21-100, and $1 62 1-2 for said *ca. sa.* or be otherwise discharged according to law, then and in such case the obligation to be void, and of no effect, otherwise to be and remain in full force and virtue in law." The condition of the bond which the statute directs is, "That the debtor shall not break or depart from the bounds, without the leave of the court, or being released by the order of the plaintiff, at whose suit he, the debtor, is confined." The words of the bond, taken in this case, though they do not literally pursue those of the statute, are substantially the same, and do not in any respect vary the contract which would have been formed, had the very language of the act been pursued.

We have repeatedly decided that in whatever form parties chose to bind themselves, they would be bound. The law of the *recopilacion*, under which these decisions were made, was imperative on the court, and its equity is as striking as its commands are clear. It was certainly not intended to say that every bond, which parties might sign, was valid—but that every engagement, entered into on a good and lawful consideration, was binding, no matter what form was given to the contract. The bond in this instance, had a lawful consideration, and we think the breach of the condition authorised the obligee to sue on it. The case cannot in any respect be distinguished from that of *Wood & al.* vs. *Tick*, 10 *Martin*, 196.

It has been contended that the bond was taken since the passage of the act repealing the ancient laws of the country; but a reference to the date shews it to have been given before.—Had it been entered into after, we should then have had the question presented to us, whether in the absence of any positive law, we could have adopted a better rule than that which was contained in the *recopilacion*, but this it is unnecessary to decide.

East'n. District. *May*, 1829.

BRYAN vs. TURNBULL & AL.

II. The equity of permitting the sureties to discharge themselves from responsibility by surrendering the body of their principals to the sheriff, has been strongly pressed on us, and the argument is certainly not without weight. But we do not feel authorised on such a consideration, to relieve the defendants contrary to the express terms of their obligation; having entered into an agreement by which they became responsible, unless certain events took place, it is not in the power of the court to add to, or diminish any of the grounds on which their liability was to cease. The right of bail to surrender the principal, where they are bound, for his appearance to answer the judgment of the court, is given by a provision of the code of practice, and no such provision is made in relation to sureties for the prison bounds. The according of such a privilege in the one case, and the silence in regard to it on an another, offer a strong reason for believing that it was the intention of the legislature to make a difference between them. We have looked thro' all the books within our reach, and we cannot find a single case where such a right has been claimed on behalf of sureties for prison bounds, and yet the instances must have been numerous

where it was their interest to surrender the debtor's body and consign him to close custody. *Code of Practice*, 230, 730.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

M'Caleb for the plaintiff— *Watts* for the defendants.

PATIN vs. *NABA.*

If the plaintiff does not prove his case, he is to be non-suited.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This is an action in redhibition. The general issue is pleaded. The court below gave judgment for the defendant, and the plaintiff appealed.

An examination of the evidence has convinced us, that the judge of the first instance has not erred. The proof does not establish the existence of the disease, at the time the plaintiff purchased.

It is therefore ordered, adjudged and de-

East'n. District. *May*, 1829.

PATIN *vs.* NABA.

creed, that the judgment of the district court be affirmed with costs.

Trabuc for the plaintiff—*Canon* for the defendant.

BAILEY & AL. vs. *BALDWIN.*

If the party trusted be solvent at the time, his ceasing to be so, does not render the party who trusted him, liable.

The code of practice does not dispense with an amicable demand

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court. The petitioners state that they delivered to the defendant ten bales of cotton, out of which he was to pay himself the amount of a due bill in his hands and refund the overplus to them. That the difference between the amount of the one and the proceeds of the other was eighty-five dollars, twelve cents, which he refuses to pay: and that he also refuses to deliver up the obligation which the cotton was given to discharge.

The defendant answers, that in March 1823, the plaintiffs did deliver to him a quantity of cotton, to be shipped and sold by the respondent, and the proceeds applied to the payment of an execution against them, at the suit of McLanahan & Bogart, according to the written consent of said plaintiffs.

That the cotton was shipped in pursuance of this agreement to John Clay, who was then doing business in New-Orleans, and was in good credit. That it was sold by him, but that before rendering an account, and making payment of the proceeds, he failed, and became insolvent, whereby said cotton and proceeds were lost.

That in consequence of the premises, the plaintiffs are still bound and liable to deliver other cotton, or pay the price thereof in money to the respondent, who therefore reconvenes them for the value, three hundred and ninety dollars.

Prescription, and the want of an amicable demand are also pleaded.

The judge below decided against the plaintiffs, as to the money claimed in the petition; but directed the defendant to surrender the due bill, and pay the costs. From this judgment he appealed, and the plaintiffs in this court have prayed that the decree be so amended, as to allow them the stated difference between the obligation which the defendant held, and the amount for which the cotton sold.

By the answer of the defendant, he appears to have been the agent of McLanahan & Bogart, and nothing proved in evidence establishes

East'n. District. *May*, 1829.

BAILEY & AL. *vs.* BALDWIN.

a right in him to demand the amount of them. It is proved, however, on the part of the plaintiffs, that the cotton was delivered in payment of a due bill which the defendant held on them, and he has not shewn, though he has alleged, that he was acting as the agent of another. He must, therefore, surrender the obligation, if the evidence prove a right in the plaintiffs to demand it.

The principal proof on this head is contained in the testimony of Thomas, who swears the defendant accepted the cotton in discharge of the note. Nothing which falls from the other witnesses in any respect impairs the credit, due to this statement, and, as the note was discharged it must be surrendered.

But as to the overplus, it is clear the defendant acted as the agent of the plaintiffs, in selling the cotton, and he is not responsible for it. It is shewn, that Clay, to whom it was sent for sale, was in good credit at the place of the residence of the parties at the time the shipment was made.

The remaining question relates to the costs. The parish judge formed his opinion on the 549th and 169th articles of the code of practice, and concluded, that as no real tender had

been made, the defendant must pay the cost, although the plaintiffs had not made an amicable demand.

The 169th article of the code of practice says, there shall no longer be any necessity for an amicable demand *in writing*. It is impossible not to believe it was the intention of the legislature still to require a demand should be made verbally. Had they intended to abolish it entirely, they would certainly have said, it shall no longer be necessary to make an amicable demand. The 549th article does no more than re-enact the provision, found in our laws previous to the passage of the code of practice. By them, the party cast was to pay the costs, and a real tender compelled the plaintiff to proceed at the risk of paying them, if he did not recover more than the sum deposited by his adversary. These laws were never understood to do away the necessity of an amicable demand, and we do not see why they should have a greater effect by being found in the code. They could well stand together before, and they may do so now. *Vol.* 7, 264.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court

East'n. District. *May*, 1829.

BAILEY & AL. vs. BALDWIN.

be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the defendant shall deliver to the plaintiffs the obligation mentioned in their petition; that, as to the demand of eighty-four dollars twelve cents, there shall be judgment for the defendant, and that the plaintiffs pay costs in both courts.

Preston for the plaintiffs—*Lockett* for the defendant.

RAWLE vs. *SKIPWITH & AL.*

No judgment by default can be taken, until all legal objections are disposed of.

APPEAL from the court of the third district, the judge of the second presiding.

PORTER, J. delivered the opinion of the court. This case has been already before the court, and was remanded for further proceedings, and on its return to that of the first instance, judgment by default was taken against the defendants, and the judgment made final. They came into court, and moved to have the judgments set aside, on different grounds alleged by them; but the judge refused to do so, conceiving, that by the 547th and 548th articles of the code of practice he had no

power to touch the decree of the court. The defendants appealed.

When the cause was last before the court, it was presented to us on exceptions, filed to the petition. We decided that the court below had erred, in sustaining one of the exceptions, and we also examined and passed on all the others which depended on the pleadings. Those which required proof to support them, were not noticed, and one was expressly reserved, on involving an enquiry into the merits.

We, therefore, think there was an error in the court of the first instance giving judgment by default, while these exceptions were undisposed of. One of them, the allegation of the wife, that she was not responsible; because the contract, although entered into by her *in solido*, was in fact an engagement, where she was surety for her husband, and was a defence on the merits.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered and decreed, that the case be remanded to the district court, to be proceeded in according to law, the appellee paying costs of this appeal.

East'n. District. *May*, 1829.

FISHER & AL. vs. BRIG NORVAL & AL.

FISHER & AL. vs. BRIG NORVAL & AL.

If the master gives a receipt for goods left on the beach, they are at the risk of the ship.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This action is brought to recover the value of 35 bales of cotton, which were sent by the plaintiffs to be shipped on board the brig Norval, and received by the captain. They were suffered to remain on the levee, and during the night following their delivery, were burnt and consumed. It is not shewn how the fire originated.

The cotton was sent down late in the evening; but the defendants having received, and receipted for it, their responsibility must be governed by the same rules as if it had been delivered early enough to permit them to put it on board the same day.

It is proved, that the cotton was left exposed on the levee without any person to watch it, and it is proved that it is not customary in the city to put any person as a guard over cotton bales, in the situation in which they were placed.

Our code, 2725, enacts, that carriers and watchmen may be liable for the loss or damage of things entrusted to their care, unless they

can prove that such loss or damage has been occasioned by accidental and uncontroulable events.

We think the view, which the judge *a quo* took of the case, a correct one. He considered there was negligence in the defendants permitting the cotton to be exposed all night on the levee, to theft, fire and other accidents, without some person to take care of it. We view the transaction in the same light. It is not the care which a prudent man would take of his own property, and the defendants must shew such care to excuse them from the loss which has occurred. It is not a good excuse to say, that it is not customary to place a watch over property, such as this. If any such custom has been introduced in this city, by those who have had the property of others transmitted to them for sale or transportation, the sooner they are informed, that such custom cannot controul the law, and will not be recognized by courts of justice, the better.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

McCaleb for the plaintiffs—*Eustis* for the defendants.

East'n. District.
May, 1829.

MAYOR & AL. vs. MAIGNAN.

If the matter in dispute, be under the value of $300, the supreme court cannot act on the case.

MAYOR & AL. vs. *MAIGNAN.*

PORTER, J. delivered the opinion of the court. The defendant applies for a mandamus, to the judge of the parish, to grant him an appeal from a judgment rendered against him, in the parish court, at the suit of the plaintiffs.

The affidavit, on which this application is made, states the amount claimed, and decreed by the court below to be paid, was forty-nine dollars seventy-three cents, and of such a sum the court has not jurisdiction. He contends indeed it makes a part of a larger sum, which the plaintiffs will continue to demand of him; but, admitting this to be true, the court cannot take cognizance of the case; for, the matter in dispute here, is below that which the constitution authorizes us to examine.

We cannot distinguish the application from that of *Millaudon* vs. *the judge of the parish of Jefferson*, where a similar demand was refused. 6 *Martin, n. s.* 24.

It is therefore ordered, adjudged and decreed, that the rule be discharged.

BULLOC vs. *PARTHET.*

The judgment must follow the verdict.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. The defendant and appellant assigns as error apparent on the face of the record, a discrepancy between the judgment and the verdict, on which it purports to be grounded.

The verdict is in these words: "The jury find a verdict for $574 96, in favor of the plaintiff, in cash—the said plaintiff to receive one half of the proceeds of the outstanding debts and goods left behind by the defendant, say $751 87 of goods, and $946 18 in notes and debts, as charged in the defendant's account."

The judgment is for $574 96 in cash, $751 87 in goods and $946 18 in notes and debts, &c.

Now by examining the defendant's account to which the verdict expressly refers, it appears that the two last sums are the whole of the goods unsold and debts not collected, of which the jury intended the plaintiff to receive one half only. The error is manifest and obvious.

East'n. District. *May*, 1829.

BULLOC *vs.* PARTHET.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the plaintiff recover from the defendant the sum of five hundred and seventy-four dollars and ninety-eight cents—and that the defendant account to the plaintiff, or transfer to him one half of the goods unsold and left behind, and one half of the notes and debts uncollected—the plantiff's said half being three hundred and seventy-five dollars and ninety-three cents in goods, and four hundred seventy-three dollars and nine cents in notes and debts, the appellee, paying costs in this court and the appellant, below.

Moreau and *Soule* for the plaintiff—*Canon* for the defendant.

BAILEY vs. *TAYLOR.*

APPEAL from the court of the first district.

One in possession of property of the United States, cannot be forcibly ousted.

PORTER, J. delivered the opinion of the court. The petitioner, while in the service of the United States, as inspector of the customs, built a house on property belonging to them. The defendant took forcible possession of the

house, and refuse to deliver it up. This action is brought to recover possession of it, and damages for the illegal entry and detention. The defence set up is, that the land on which the building was erected belong to the general government, and that the defendant was ordered to take possession by the surveyor of the customs.

The court of the first instance thought this defence untenable, gave judgment in favor of the plaintiff for one hundred and eighty dollars, and ordered the plaintiff to be put in possession. From this judgment the defendant has appealed.

We think the judgment rendered, below, must be confirmed. We know of no law which authorises a surveyor of the customs to direct a forcible entry and ouster of possession, of the United States' property. If the defendant held wrongfully, there were legal means of evicting him.

It is therefore ordered, adjuged and decreed, that the judgment of the district court be affirmed with costs.

Preston for the plaintiff—***Maybin*** for the defendant.

East'n. District.
May, 1829.

JARDELA
vs.
ABAT.

APPEAL from the court of probates of the parish and city of New-Orleans.

A donation must be made before a notary and two witnesses.

PORTER, J. delivered the opinion of the court. This action has for its object to settle the right of property to a negro slave and her two children, inventoried, as the property of the deceased, and claimed by the plaintiff, his natural daughter, as belonging to her.

Neither of the parties shew a written title to the property. The defendant indeed offers a bill of sale to the ancestor of the petitioner, for two slaves named *Maria* and *Isabella*, and has attempted to prove, by parol evidence, that the latter is the same who is now called *Nina*, and is the subject of this suit. This evidence is very unsatisfactory. One of the witnesses, who was introduced to establish the fact, is the mother of mortgage creditors, whose share will be increased out of the insolvent estate, if this slave is established to belong to it. Her testimony was taken, subject to an exception, and in our opinion, she was incompetent. The executor in this action represents the creditors of the succession. They could not give evidence, and consequently their ascendant could not. The testimony of this witness excluded

the weight of evidence, in regard to the identity of the slave, is with the plaintiff.

But the defendant contends, that the title of the plaintiff is by a donation from her father, and this donation is null and void; first, because it was not made in due form of law, and second, because at the time of making it the deceased was largely indebted.

On this point we think the defendant must succeed. Several witnesses were introduced on the part of the plaintiff, who testified, that for many years previous to the death of the father, he was heard to say, that the slave in question with her offspring, belonged to the plaintiff. One of them goes further, and states, that she knows the slaves were the property of the petitioner, because her father told the witness that he had given the slave to his child. No evidence is offered to explain or do away the effect of this testimony. The impression on our minds is that it is the truth of the case. The plaintiff is a person of color, and the natural child of the deceased. It has not been shewn how she acquired, at so early an age as that at which she must have been, when this slave came into the house of her father, the means to purchase property of this value. While her own witness, uncontradicted, states the father

East'n. District. *May*, 1829.

JARDELA *vs.* ABAT.

to have given the slave to his daughter. We cannot escape from the effect it is entitled to, and declare the gift void, as not made before a notary and in the presence of two witnesses.—*C. Code*, 220, *art.* 53.

It is therefore ordered, adjudged and decred, that the judgment of the court of probates be annulled, avoided and reversed, and that there be judgment for the defendant with costs in both courts.

Canonge for the plaintiff—*Seghers* for the defendant.

MEILLEUR & AL. vs. *COUPRY.*

A slave under thirty years of age, cannot be presumed to have been emancipated.

APPEAL from the court of probates of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. The heirs of Louise Rilieux, obtained a rule against Coupry, who had obtained letters testamentary on her estate, to shew cause why they should not be revoked, on a suggestion, that he was a slave, and therefore incapable of exercising the office of testamentary executor. He contended that he was a free man: the court thought otherwise. The letters were revoked, and he appealed.

His counsel urges, in this court, that the appellees have not established their heirship, and are without interest in the case. An examination of the record shews, that this point was not made below. The applicants must be considered as plaintiffs, and, as such, not bound to establish their capacity as heirs, while it was not denied. The appellant was called on to shew cause; he did so, by denying he was a slave, and this was the only issue before the court.

It was admitted that he was born of a slave mother, that his mother's owner has ever resided, and still resides, in New-Orleans, that he is twenty-seven or twenty-eight years of age, that he has enjoyed his freedom for fourteen years and been married as a free man.

On these facts, it is clear, he was born a slave, and must continue so, unless he was emancipated; as he is under the age of thirty years, and the lawful emancipation of a slave cannot take place before that age, the presumption of a legal emancipation, which might result from his long possession of his freedom, is repelled, from the evident impossibility of his legal emancipation having taken place, and

East'n District. *May*, 1829.

MEILLEUR AND AL. vs. COUPRY.

the legal impossibility of a slave becoming free, without a legal emancipation.

Prescription can no more avail him, than it would the possessor of property evidently out of commerce.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be affirmed, with costs.

Seghers for the plaintiffs—*DeArmas* for the defendant.

CORKERY vs. *BOYLE.*

The surrender of goods by the payee, is a good consideration for the note.

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court. This action is brought on a promissory note, made by the defendant, in favor of the plaintiff. It is alleged in the answer, that it was fraudulently obtained, and that no consideration was received for it.

The facts of the case shew, that the parties entered into partnership, in Baltimore, the defendant furnishing the stock, the plaintiff to come out to New-Orleans and sell the goods: the profits to be equally divided be-

tween them. The plaintiff, in pursuance of this agreement, did come here, and carried on the business for some time. No profit was made by it. The defendant, becoming dissatisfied, came out, and demanded of the plaintiff the merchandize which remained unsold. The latter refused to deliver them up, unless the former would give him his note for four hundred dollars: after much hesitation and reluctance, he did so, and he avers, and the evidence goes strongly to support the assertion, that he did so to get his goods out of the hands of the plaintiff.

The court below thought the plaintiff should recover, and this court is of the same opinion. The profits which might have been made from the sale of the goods, handed over, formed a good consideration for the obligation. There is no evidence which enables us to say what might have been the gain on them, if they had remained in the hands of the plaintiff.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

Gayarre for the plaintiff—*Preston* for the defendant.

East'n. District. *May*, 1829.

MILLAUDON vs. POLICE JURY.

Authentic acts are full evidence against the parties and those who claim under them.

MILLAUDON vs. *POLICE JURY.*

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The petitioner states that he is the owner of a plantation, on the right bank of the Mississippi, which is burdened with a servitude in favor of certain inhabitants of the shores of lake Barrataria, who had a right of way over his plantation, from the river to the lake; that the police jury of the parish of Jefferson pretend that he is bound to keep in repair a public road or highway over his said plantation, from its front to the depth or back line, and are incessantly harrassing him with orders to keep said highway in repair, and vexatious proceedings, in consequence of said orders: he prayed and obtained an injunction, &c.

The defendants pleaded the general issue, and averred, that ever since there was a settlement made on the shores of the lake, there has been a highway, royal or public road through the plantation of the petitioner, leading from the river to the lake, which the owner of it has ever been bound to keep in repair, &c.

The injunction was made perpetual, and the defendant appealed.

The record shews that, about the year 1779, Governor Galvez settled a few families on the shores of lake Barrataria, and he caused to be opened, at the public expense, a royal or public road or highway, taking the ground therefor, by equal proportions, from the plantations, through which it passed.

That in the act of sale of the premises in 1803, by Lartigue to Dominique Bouligny, there is a clause, by which the vendor states, that the plantation owes a public road, which it is bound to keep in repair. A similar clause is inserted in the act of sale of Dominique Bouligny to Lewis Bouligny, in 1810, as well as in the sale from Lewis Bouligny to Tricoa & al. from whom the petitioner bought.

Now, these authentic acts are entitled to full faith against the parties and the petitioner, who holds under the vendees, of every thing which the parties had in view, and which constitutes the object of the act. *Pothier on obligations*, 701.

The object of the act was to describe the thing sold, the advantages which it had, and the burdens which had been imposed on it.

Now, the parol testimony and documents establish, that Galvez laid out a public road,

East'n. District. *May*, 1829.

MILLAUDON vs. POLICE JURY.

from the Mississippi to lake Barrataria, taking the ground from the plantations along the boundaries of which it passed. After the lapse of half a century, it must be presumed that the proprietors consented to, or were indemnified for, the sacrifice: that the road was kept in repair by them and their successors is proved. In the oldest deed that is produced, executed a quarter of a century ago, the burden imposed on the land is stated; a clause recognises it in two subsequent acts of sales, to which reference is made. In one of these acts, introduced by the plaintiff, the road is traced and marked *camino real.* It is in vain that the appellant's counsel urges, that the police jury were not parties to these deeds, and therefore cannot claim any right from them. We have seen that parties must be bound by their own declarations: and when the law requires these declarations to be written, it matters not into what acts they are consigned: they are not the less the declarations of the parties, who must be bound by them, and in cases like the present those who derive their rights from the parties who made these declarations, must take them affected with all the legal consequences of these declarations.

It is in evidence, that by an agreement, in 1817, subscribed by a number of proprietors, it was agreed that the road should be removed from one side of the bayou by which it ran to the other; it being thought that, both those who use the road, and those who were bound to repair it, would be thereby benefitted. This circumstance does not affect the present case: the question is not as to the particular part of the petitioner's estate the road is to run through, but as to his obligation to repair it.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, be annulled, avoided and reversed, the injunction dissolved, and that the appellee pay costs in both courts.

Seghers for the plaintiff—*C. Derbigny* for the defendants.